TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 145.

THE NEW YORK CONTINENTAL JEWELL FILTRATION CO., PLAINTIFF IN ERROR,

vs.

THE DISTRICT OF COLUMBIA.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED OCTOBER 11, 1909.

(21,859.)

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In the Court of Appeals of the District of Columbia

No. 1938.

THE NEW YORK CONTINENTAL JEWELL FILTRATION CO., Appellant,
vs.
THE DISTRICT OF COLUMBIA.

a Supreme Court of the District of Columbia.

At Law. No. 49459.

THE NEW YORK CONTINENTAL JEWELL FILTRATION COMPANY, Plaintiff,
vs.
THE DISTRICT OF COLUMBIA.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above entitled cause, to wit:

1 *Declaration, &c.*

Filed May 15, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 49459.

THE NEW YORK CONTINENTAL JEWELL FILTRATION COMPANY, Plaintiff,
vs.
THE DISTRICT OF COLUMBIA.

The plaintiff, a corporation, organized and existing under the laws of the State of New Jersey, sues the defendant, a municipal corporation for that:

First. Heretofore, to wit, on July 20, 1903, and at divers other times, hereinafter mentioned, the plaintiff, acting in that behalf as the agent of the Philadelphia, Baltimore and Washington Railroad Company, was engaged in constructing for the said railroad, certain tunnels at and about the intersection of New Jersey Avenue and D

Street, southeast, in the City of Washington and District of Columbia, which the said railroad was authorized and required to construct at the said place and in accordance with certain plans, by two certain acts of Congress, namely: the act, entitled "*An Act to provide for eliminating certain grade crossings on the line of the Baltimore & Potomac Railroad Company, in the City of Washington, District of Columbia, and requiring said Company to depress and elevate its tracks, and to enable it to relocate parts of its railroad therein, and for other purposes*" approved February 12, 1901, and the act,

2 entitled "*An Act to provide for a union railroad station in the District of Columbia, and for other purposes,*" approved February 28, 1903. The construction of the said tunnels, at the place and in accordance with the plans prescribed by law as aforesaid rendered necessary certain changes in the location of certain sewers and water mains of the city of Washington, at and about the said intersection of New Jersey Avenue and D street, south-east, and in the location of the water-mains of the said city, underlying C Street between New Jersey Avenue and Second Street, south-east. From time to time, the defendant caused estimates to be made of the cost of making the said changes and gave notice thereof, to the plaintiff, each of the said notices conveying an offer by the defendant to make the change therein referred to, provided that the plaintiff would deposit with the defendant, a sum of money equal to the estimated cost thereof. The said notices bore date and stated as follows: July 20, 1903, notice that the estimated cost of making changes in the location of water mains, rendered necessary by the construction of the said tunnels at and about New Jersey Avenue and D Street, south-east, was $488.00; July 21, 1903, notice that the estimated cost of making changes in the location of sewers at and about the said place, rendered necessary by the construction of the said tunnels was $7,693.00; and April 21, 1904, notice that the estimated cost of making changes in the location of the water main underlying C Street between New Jersey Avenue and Second Street, south-east, rendered necessary by the construction of the said tunnels, was $600.00.

3 After the receipt of the said notice and pursuant thereto the plaintiff did deposit with the defendant the amounts of the said several estimates, namely: the sum of $488.00; the sum of $7,693.00; and the sum of $600.00, amounting, in all, to the sum of $8,781.00. The said deposits were made by the plaintiff and received by the defendant upon the condition, and at the times thereof it was agreed between the plaintiff and the defendant, that the defendant would make the changes provided for and would expend from the said deposits, so much money as might be necessary to defray the cost of such part or parts of the work done in and about the making of the said changes as the plaintiff or the said railroad was required by law to perform or pay for, and upon the completion of the said work any balances of the said deposits, remaining over and above the cost of the part or parts thereof which was chargeable to the plaintiff or payable from the said deposits would be returned to the plaintiff by the defendant. Thereafter the work required to make each and all the said changes was completed by the defendant,

and notice thereof was given the plaintiff by the defendant as follows: On November 2, 1905, notice of the completion of work upon the said change in the location of sewers; and on June 21, 1904, notice of the completion of the work upon the said two changes in the location of water mains. Thereafter the plaintiff demanded of the defendant the return of sums amounting to $7,181.64 as and for the balances of the said deposits, remaining over and above the cost of all work done by the defendant in and about the said changes, which was chargeable to the plaintiff or payable from the deposits
4 made by the plaintiff as aforesaid. The said balances, payment of which was so demanded by the plaintiff, were as follows: $6,136.26, being the balance of the said deposit of $7,693.00, and $1,045.38, being the balance of the said two deposits of $488.00 and $600.00; but the defendant failed and refused to pay the plaintiff the said sum of $7,181.64, and the same has not been paid nor any part thereof, and the plaintiff claims the sum of $7,181.64, with interest on $6,136.26 from November 2, 1905, and on $1,045.38 from June 21, 1904, besides costs.

Second. For money lent by the plaintiff to the defendant; and for money received by the defendant for the use of the plaintiff, and for money found to be due from the defendant to the plaintiff on accounts stated between them. And the plaintiff claims the sum of $7,181.64, with interest on $6,136.26 from November 2, 1905, and on $1,045.38 from June 21, 1904, according to the particulars of demand hereunto annexed, besides costs.

JAMES H. HAYDEN,
Attorney for Plaintiff.

Notice to Plead.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of service hereof, otherwise judgment.

JAMES H. HAYDEN,
Attorney for Plaintiff.

5 *Particulars of Demand.*

District of Columbia to the New York Continental Jewell Filtration Company.

DR.

1904.				
June	20.	To deposit No.	788 (December 15, 1903) ...	$7,693.00
"	21.	" deposit	787 (December 15, 1903) ...	488.00
"	21.	" deposit	1340 (April 22, 1904)	600.00
				$8,781.00

Cr.

1905.			
November 2.	By cost of work done upon change of sewer at and about New Jersey Avenue and D Street, S. E., Washington, D. C., chargeable against deposit No. 788 (*supra*)..	$1,556.74	
1904.			
June 21.	By cost of work done upon changes of water mains, chargeable against deposits Nos. 787 and 1340 (*supra*)..	42.62	
			$1,599.36
	Unexpended balances of deposits Nos. 788, 787 and 1340.....		7,181.64

STATE OF NEW YORK, *City and County of New York*, ss:

E. G. Williams, being duly sworn deposes and says that he is above the age of twenty one years and that on and at all times since the 20th day of June, 1903, he was and has been the resident engineer of the New York Continental Jewell Filtration Company, the plaintiff named in the foregoing declaration, and for and in behalf
6 of the said company has had entire charge and supervision of the work of constructing for the Philadelphia, Baltimore, and Washington Railroad Company the tunnels located at and about the intersection of New Jersey Avenue and D Street, south-east. That in the construction of the said tunnels the plaintiff acted as the agent of the said railroad. That the work upon the said tunnels was done pursuant to and in accordance with the terms of a contract, entered into between the plaintiff and the said railroad, and pursuant to and in accordance with the provisions and requirements of the two certain acts of Congress referred to in the foregoing declaration, whereby the said railroad was authorized and required to construct the said tunnels at the place above mentioned and in accordance with certain plans. That the construction of the said tunnels at the place and in the manner authorized and required by law as aforesaid, rendered necessary certain changes in the location of certain sewers and water mains of the city of Washington, at the intersection of New Jersey Avenue and D Street, south-east, and thereabouts. That from time to time before the making of such changes the Engineer Commissioner of the District of Columbia, acting in that behalf as the agent of the said District, directed notices to the plaintiff, which stated that he had procured estimates of the cost of making changes in the location of the said sewers and water mains, rendered necessary by the construction of the said tunnels, and that the said District of Columbia would perform the work required to make the said changes if the said Filtration Company would deposit with the Collector of Taxes of the said District, certain sums, being the
7 estimated cost of the said work. The said notices bore date and provided as follows: July 20, 1903, notice that the esti-

mated cost of changing the location of water mains at and about the intersection of New Jersey Avenue and D Street, south-east, was $488.00; July 21, 1903, notice that the estimated cost of changing location of sewers at and about the same place was $7,693.00; and April 21, 1904, notice that the estimated cost of changing the location of water mains underlying C Street, between New Jersey Avenue and Second Street, south-east, was $600.00. After the receipt of the said notices the plaintiff did deposit with the said Collector of Taxes, the amounts of the said estimates, as follows:

December 15, 1903	$488.00
December 15, 1903	7,693.00
April 22, 1904	600.00
Total	$8,781.00

The Collector received and receipted for the said deposits and the same were made by the plaintiff and received by the defendant upon the condition and with the understanding that the defendant would perform the work required to make the changes contemplated and would use so much of the money deposited by the plaintiff as might be necessary to pay for such part or parts of the said work as the said company or the said railroad was required by law to perform or pay for and that any balances of the said deposits, remaining after the said District had performed and paid for such parts of the said work should be returned to the plaintiff. Thereafter the said changes in the location of the said water mains and sewers were made by the said District and in and about the same certain
8 work was done both within and without the right of way granted to or provided for the said railway by the acts of Congress, hereinbefore mentioned. Notice of the completion of the said work, accompanied by a tender of certain sums of money, as and for the unexpended balances of the said deposits, were directed to the plaintiff by the defendant, as follows: November 2, 1905, a notice of the completion of work upon the change in the location of sewers, with tender of $1012.68, as the alleged unexpended balance of the deposit of $7,963.00, made by the plaintiff as aforesaid; June 21, 1904, notice of the completion of work upon the aforesaid changes in the locations of water mains, with tender of $77.11, as the alleged unexpended balance of the two deposits of $488.00 and $600.00, made by the plaintiff as aforesaid. The plaintiff refused to accept payment of the said sums of $1,012.68 and $77.11, so tendered to it by the defendant, and, on or about November 2, 1904, and November 8, 1905, by letters then directed to the Commissioners of the District of Columbia, the plaintiff demanded the return of the following sums, being the balances of the said deposits remaining in the hands of the defendant, over and above the cost of all work done in or about the said changes for which the plaintiff was chargeable, namely, the part of the said work done within the right of way of the said railroad, viz: of the said deposit of $7,693.00, an unexpired balance of $6,136.26, and of the said deposits of $488.00 and $600.00, together amounting to $1,088.00, unexpended balances amounting to

$1,045.38. Thereafter the defendant failed and refused to return or pay to the plaintiff the sums demanded by it as aforesaid and
9 the same have not been paid nor any part thereof and the defendant has not returned or paid to the plaintiff any sum or sums whatever, as the unexpended balances of the deposits made by the plaintiff as aforesaid. That by reason of the foregoing facts, there is due and payable to the plaintiff by the defendant the sum of $7,181.64, exclusive of all set offs and just grounds of defense.

E. G. WILLIAMS.

Subscribed and sworn to before me this 8th day of May, 1907.
[SEAL.] E. L. FERRIS, JR.,
Notary Public (23), *New York County.*

Pleas.

Filed July 30, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 49459.

NEW YORK CONTINENTAL JEWELL FILTRATION CO.
vs.
THE DISTRICT OF COLUMBIA.

1. The defendant, the District of Columbia for a first plea to the declaration filed herein, and each and every count thereof, says it never undertook and promised as alleged.

2. And for a further, and second plea, to the declaration,
10 filed herein, and to each and every count thereof, the defendant, the District of Columbia says it never was indebted as alleged.

EDWARD H. THOMAS,
Attorney for Defendant.

DISTRICT OF COLUMBIA, *ss:*

Conway B. Hunt, being first duly sworn, deposes and says: That at the times mentioned in the declaration in this case and in this affidavit he was and still is the Engineer of Highways of the District of Columbia, and has personal knowledge of the doing of the work under the said Acts of Congress mentioned in the said declaration and in this affidavit, including the work done by the plaintiff as the agent of the said Philadelphia, Baltimore and Washington Railroad Company, and that he has official knowledge of the other matters herein set forth, acquired from the records of the District of Columbia officially kept of the said transactions sued on in this case; that the said work was in fact done by the said Railroad Company and that the defendant only incidentally had any connection with the plaintiff in the doing of the said work and that its real con-

tract relations was with the said railroad company as principal, and not with the plaintiff; that the matters of account growing out of deposit of money with the defendant by the plaintiff as agent for the said railroad company are really between the said railroad company and the defendant and any differences as to the application of the said money should be settled between the plaintiff and the said railroad company; that the defendant denies the right of the
11 plaintiff to recover any part of its claim and the grounds of defense are as hereinbefore and hereinafter set forth; that the said railroad company, pursuant to said Acts of Congress, applied for and received from the District of Columbia a permit to do the said work on its part to be done which said permit provided, among other things, that the said Railroad Company should deposit sufficient sums of money with the Collector of Taxes for the District of Columbia as may be necessary to defray such expenses as may be incurred by the District of Columbia in making good all damages to any District work injured and in restoring all pavements disturbed by changes made in connection with said work; that said permit was issued on the 10th day of September, 1903, and accepted by said railroad company and that the said plaintiff had notice thereof prior to its contract with the said railroad company and of its said transactions with this defendant; that on the 10th day of December, 1903, the plaintiff entered into a contract with the said railroad company to furnish material and labor and construct and finish two certain tunnels for the said railroad company, which were provided to be constructed under the said Acts of Congress by the said railroad company and out of which work the controversy in this case has arisen; that the plaintiff in and by its said contract engaged and agreed to provide, at its own cost and expense, and to take care of the guarding, removing, changing or altering all water mains and gas pipes, sewers, passenger railway tracks and railway, telephone, electric light and other conduits and to obtain from the proper authorities of the District of Columbia the necessary permits to make any changes which may be necessary in said streets, avenues, alleys or sidewalks,
12 or in the location of said water mains and gas pipes, sewers, tracks and conduits, and after the completion of the said tunnels agreed to restore the streets, avenues, sidewalks and alleys which might be interfered with by the construction of the same to the condition in which they then were, to the satisfaction of the Commissioners of the District of Columbia, within sixty days after the date when said tunnels shall have been completed; provided that it should not be called upon to regrade any street, avenue, sidewalks or alleys whose present grade is below the line of the top of the tunnel.

That the said railroad company, the principal of the plaintiff, and the Engineer Commissioner of the District of Columbia understood and agreed that the plaintiff should be at the whole expense of taking care of the passenger railways, sewers, water pipes, or anything else they met during the construction of said improvements; and that about July 16, 1903, the plaintiff advised the said Engineer Commissioner that it desired, as agent for the said railroad company, to have the necessary changes made by the defendant in the sewers

and water mains at New Jersey avenue and D street, southeast, which changes cover two of the three changes involved in this action; that on April 20, 1904, the plaintiff requested the Superintendent of the Water Department of the District of Columbia to make the necessary changes in the water mains at C street southeast, between Second street and New Jersey avenue, this being the third and last of the three changes involved in this action. In reply to these requests from the plaintiff as agent of the said railroad company, and in compliance with said request, the plaintiff was notified that it
13 would cost it, and not the defendant, by notice dated July 20, 1903, the estimated sum of $488.00 for necessary changes in water mains, caused by the construction of tunnels at New Jersey avenue and D street, southeast; on July 21, 1903, that it would cost it, the plaintiff, and not the defendant, the estimated sum of $7693.00 for necessary changes in sewers caused by construction of tunnels at New Jersey avenue and D street, southeast; on April 24, 1904, that it would cost it, the plaintiff, and not the defendant, the estimated sum of $600.00 for changes in water mains in C street, southeast, between New Jersey avenue and Second street.

This affiant says the plaintiff accepted the said notices that it would be required to pay the cost of the said work in accordance with its said request and that it voluntarily made the deposit of the said estimated cost and that there remains to be accounted for to the plaintiff, if at all, only the difference between the said estimated cost and the actual cost thereof and that the said request was made by the plaintiff for its own benefit, otherwise it would have been obliged to do the said work itself, and that the plaintiff chose, as a mere matter of convenience to itself, to let the District of Columbia do the said work for it, presumably because the same could be done at a more reasonable cost by the District than it could have been done by the plaintiff. That upon an adjustment and re-adjustment of said expenses it has been found that the actual cost of the necessary changes under the said notice dated July 20, 1903, and the notice dated April 21, 1904, being represented by certificates of deposit Nos. 787 and
1340, is $1010.89; that the actual cost of the necessary
14 changes under notice dated July 21, 1903, is $6691.63, total $7,702.52, and that the balance due and to be refunded to the plaintiff, as the agent of the said railroad company is the sum of $1,078.48, which said last mentioned sum this defendant tendered to the plaintiff before it commenced this action but the said plaintiff declined and refused to receive the same. Affiant further says, on official information and knowledge, that the said actual cost above stated is the true cost of the said work done by said defendant for the said plaintiff at its request as aforesaid and that the said balance of money unexpended represents the true and actual balance remaining in the hands of this defendant as aforesaid.

Affiant further says that the plaintiff made no claim at the time it made said request to be furnished with the said estimated cost of doing the said work, and at the time the said estimate was given nor during the progress of the said work nor until after it was completed that the said work did not embrace area outside of what the plaintiff

denominates the railroad right of way. That on the contrary, the plaintiff well knew that the work which it requested as aforesaid the said District to do for it was both within and without the area occupied by the tunnels authorized to be built under said permit to the said railroad company, and was due to the physical necessity, as an engineering construction, that when the grade of a sewer is lowered the change should extend some distance from its point of depression to its point of junction with the undisturbed portion of the sewer in order that the sewer might, when lowered, have a continu-
15 ous, though not necessarily a uniform falling grade; that the plaintiff also knew that the extent of the changes in the water mains were due, in a large part, to the practical necessity of removing them from the streets occupied by the tunnel during its construction, in order that accidental breakage of the mains might not occur with incidental damage to the tunnel work. Affiant further says that the plaintiff, as agent as aforesaid, by said permit and by said notices agreed to save the District from damage to its said sewers and water mains in doing said work of constructing said tunnels, and that in doing said work for it the defendant was put to the cost and expense as aforesaid of preventing injury and damage to said sewers and water mains, and that the said charges for doing the said work were just, fair and reasonable, and that the question of the railroad right of way does not enter into the matter of the contract between the parties.

C. B. HUNT.

Subscribed and sworn to before me this 29th day of July, A. D. 1907.

[SEAL.] A. LEFTWICH SINCLAIR,
Notary Public, D. C.

16 *Replication.*

Filed August 8, 1907.

In the Supreme Court of the District of Columbia.

Law. No. 49459.

NEW YORK CONTINENTAL JEWELL FILTRATION COMPANY, Plaintiff,
v.
THE DISTRICT OF COLUMBIA, Defendant.

The plaintiff joins issue on the first and second pleas of the defendant.

JAMES H. HAYDEN,
Attorney for Plaintiff.

Memorandum.

March 9, 1908.—Verdict for Plaintiff for $1,089.79 with interest from June 21, 1904.

17 Supreme Court of the District of Columbia.

MONDAY, *March 16th*, 1908.

Session resumed pursuant to adjournment, Hon. Thos. H. Anderson, Justice, presiding.

* * * * * * *

No. 49459. At Law.

THE NEW YORK CONTINENTAL JEWELL FILTRATION COMPANY, Plaintiff,
vs.
THE DISTRICT OF COLUMBIA, Defendant.

It appearing that under the Rule of Court judgment on verdict should be entered herein, it is so ordered. Thereupon, it is considered and adjudged that the plaintiff herein recover of defendant herein the sum of Ten Hundred and Eighty-nine Dollars and seventy-nine cents, with interest from June 21st, 1904, together with costs of suit to be taxed by the Clerk and have execution thereof.

From the aforegoing, the plaintiff by its attorney notes an appeal in open Court, to the Court of Appeals, whereupon the penalty of a bond for costs on appeal is hereby fixed in the sum of One Hundred Dollars.

18 Filed Mar. 17, 1908. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

At Law. No. 49459.

THE NEW YORK CONTINENTAL JEWELL FILTRATION COMPANY
vs.
THE DISTRICT OF COLUMBIA.

The President of the United States to The District of Columbia, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein, under and as directed by the Rules of said Court, pursuant to an Appeal to the Court of Appeals filed in the Supreme Court of the District of Columbia, on the 16th day of March, 1908, wherein The New York Continental Jewell Filtration Company is Appellant, and you are Appellee, to show cause, if any there be, why the Judgment rendered against the said Appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Harry M. Clabaugh, Chief Justice of the

Supreme Court of the District of Columbia, this 17th day of March in the year of our Lord one thousand nine hundred and eight.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk*,
By H. BINGHAM,
Ass't Clerk.

Service of the above Citation accepted this 17 day of March, 1908.
E. H. THOMAS,
Attorney for Appellee.

[Endorsed:] No. 49459 Law. N. Y. Cont. Jewell F. Co. *vs.* D. of C. Citation. Issued Mar. 17, 1908. Filed Mar. 17 1908. J. R. Young, Clerk.

19 *Memoranda.*

March 19, 1908.—Appeal bond filed.
March 31, 1908.—January term of Court prolonged 38 days to settle Bill of Exceptions.
April 21, 1908.—Time to file Transcript of Record in Court of Appeals extended from time to time to and including August 1st, 1908.
May 19, 1908.—Bill of Exceptions submitted to Court.

Supreme Court of the District of Columbia.

WEDNESDAY, *July 22d*, 1908.

Session resumed pursuant to adjournment, Hon. Thos. H. Anderson, Justice presiding.

No. 49459. At Law.

THE NEW YORK CONTINENTAL JEWELL FILTRATION COMPANY, a Corporation, Plaintiff,
vs.
THE DISTRICT OF COLUMBIA, Def't.

The Court having this day signed the Bill of Exceptions heretofore submitted herein, orders the same of record as of the time of the noting thereof at the trial. Further the time within which to file a transcript of the record herein in the Court of Appeals is hereby extended to August 15th, 1908, included.

20 *Bill of Exceptions.*

Filed July 22, 1908.

In the Supreme Court of the District of Columbia.

Law. No. 49459.

THE NEW YORK CONTINENTAL JEWELL FILTRATION COMPANY, a Corporation, Plaintiff,
v.
THE DISTRICT OF COLUMBIA, Defendant.

SIR: Herewith I tender to you a bill of exceptions in the above entitled cause and give notice that I shall present the same to Mr. Justice Anderson, holding Circuit Court No. 2, on Tuesday, May 19, 1908, at 10 o'clock a. m., or as soon thereafter as counsel can be heard and shall then and there move the court to sign and seal the same and make the same part of the record herein.

JAMES H. HAYDEN,
Attorney for Plaintiff.

To E. H. Thomas, Esq., Corporation Counsel, Attorney for defendant.

Service of the foregoing notice and bill of exceptions tendered therewith, is hereby acknowledged, this 11th day of May, 1908.

E. H. THOMAS,
Attorney for Defendant.
G.

21 In the Supreme Court of the District of Columbia.

At Law. No. 49459.

THE NEW YORK CONTINENTAL JEWELL FILTRATION COMPANY, a Corporation, Plaintiff,
v.
THE DISTRICT OF COLUMBIA, Defendant.

Be it remembered That on the fourth day of March, 1908, before the Honorable Thomas H. Anderson, Associate Justice of the Supreme Court of the District of Columbia, and a jury regularly impaneled, the above entitled cause came on to be heard on issues regularly joined, and thereupon the plaintiff in order to maintain the issues on its part joined, by its counsel, stipulated with the defendant, by its counsel, that the cost of the work of making relocations and changes in sewers and water mains within the right of way of the Philadelphia, Baltimore & Washington Railroad Company in the portion of said right of way occupied by the tunnels constructed for said Railroad Company by the plaintiff, was $1608.03.

Thereupon the plaintiff, further to maintain the issues on its part joined, called as a witness CHARLES FERNALD, who, having been first duly sworn, gave evidence as follows:

On direct examination by counsel for the plaintiff, the witness testified as follows:

My name is Charles Fernald. I am an assistant engineer in the Engineer Department, this city, and have been for about twenty years, off and on. I am familiar with the records of that office.

Thereupon the attention of the witness was called to a plat attached to the wall of the court room, and thereupon he continued his testimony as follows:

That is a copy of a plat prepared as required by law, of the First Street tunnel line, that was approved by Commissioners Mac-
22 farland, West and Biddle, and by the Chief Engineer of the Railroad. The legend is: "No. 8451, Washington, D. C. Proposed line from 2nd and Virginia Avenue, Southwest, to 1st and Massachusetts Avenue, Northeast, to connect the P. B. & W. Railroad with new Union Station. Signed, W. H. Brown, Office of the Chief Engineer, P. B. & W. Railroad Company, Philadelphia, April 1, 1903. Approved, William H. Brown, Chief Engineer." Approved by Commissioners Macfarland, West and Biddle without date but sometime subsequent to this date. It is known as Engineer Department plan 953-1. I had charge of the entire terminal work for the city, in connection with the construction of the tunnels of the Philadelphia, Baltimore & Washington Railroad Company built by the plaintiff. The tunnels were built in accordance with the plat referred to and subsequent plans; minor changes were made in the plans later. This is the general plan on which it was built. The heavy, dotted, circular line, curving in a northwesterly direction from the intersection of New Jersey Avenue and D Street is the center line of the tunnel. The light dotted lines represent the outside lines of excavation, that is, the outside line of the tunnel masonry, marked 25 feet each side of the center line. The tunnel covered 48 feet in width as actually built; this plan shows 50 feet allotted to the railroad on which to construct the tunnel. My instructions were that they were authorized to occupy that space.

Thereupon the plat identified by the witness was offered in evidence, marked Plaintiff's Exhibit A.

Thereupon, on cross-examination by counsel for the defendant, the witness gave evidence as follows:

The tunnel began at New Jersey Avenue and D Street, the portal being at the southwest corner of New Jersey Avenue and D. It ran on D Street and then north into the station. It was not contemplated in the act of 1901. It was built pursuant to the act of 1903 and takes the place of the connection that would have been made to the Sixth Street station, had that station remained, as con-
templated by the act of 1901. There was no tunnel at this
23 point contemplated by the act of 1901. In connection with the tunnel work of which I had charge, I dealt, in an official way, entirely with the Railroad Company.

Q. Was a permit issued to the railroad company to do the whole of this work?

To the said question the plaintiff by its counsel objected on the ground that the question called for secondary evidence, and was immaterial. Thereupon the court overruled the said objection. To the action of the court in overruling the said objection, the plaintiff by its counsel noted an exception which was allowed. And thereupon the witness answered: Yes.

Thereupon the defendant by its counsel propounded to the witness the following question:

Q. Is this the permit that was issued (handing witness paper)?

Thereupon the plaintiff by its counsel objected to any evidence with respect to the said permit on the ground that the issuance and acceptance of this permit was *res inter alios acta* and evidence with respect to it, incompetent, irrelevant and immaterial.

24 The COURT: I will allow this to go in, subject to your objection. I will reserve my ruling.

Mr. HAYDEN: Will your Honor allow me an exception, however?

The COURT: You will not need an exception yet. It goes in under your objection. When I make my ruling, if it is against you, you can note your exception, or, if you want to note an exception now, all right, but I do not see that it will avail you anything, inasmuch as I have not ruled.

Mr. HAYDEN: I want to reserve my rights, because I do object to the reading of this in the hearing of the jury."

Thereupon counsel for the defendant stated that he would not read the permit to the jury at this stage. And thereupon counsel for the plaintiff admitted, subject to his objection, that the paper is a permit. And thereupon the permit was marked, "For identification J. D. R."

Thereupon the witness continued his testimony as follows:

Q. Mr. Fernald, are you familiar with about how much space was occupied within the tunnel lines, as you have given them, by this construction at New Jersey Avenue and D Street, in reference to the sewer? In other words, I want to know how much space was within the lines; how many feet of sewer within the tunnel lines described had to be removed? A. Not in detail, Mr. Thomas. Generally, the entire sewer was abandoned, cut off at that point.

Q. Prior to the time the tunnel was constructed, about how did the sewer run? Did it run across the tunnel at that point? A. I am not exactly familiar with the location. It was in such a position, however, that it had to be generally changed for a good distance outside of the right of way to catch the grade, so that, generally

25 speaking, the whole sewer was affected over the tunnel lines.

And thereupon the plaintiff, by its counsel, admitted the account stated by the District of Columbia of its disbursements made for relocations and changes of sewers and water-mains, both inside and outside the railroad's right of way, to be correct, and that, if the plaintiff were chargeable with the cost of any relocation or change made outside the right of way, the entire sum expended by the District

as set forth in its account was chargeable against the deposits made by the plaintiff.

Thereupon, on re-direct examination by counsel for the plaintiff, the witness continued his testimony as follows:

Q. You were asked on cross-examination, what length of sewer was affected by the tunnels near New Jersey Avenue and D Street, Southeast. These tunnels, at that point, were about 50 feet in width, were they not? A. The sewer may have crossed at a slight angle. It may possibly have been a little longer distance. I do not know what the length was. I do not know positively whether the sewer was abandoned as a whole, or whether it was lowered and ran under the tunnel, although I think it was lowered.

And thereupon, further to maintain the issue*d* on its part joined, the plaintiff called as a witness EDWARD G. WILLIAMS, who, being first duly sworn, gave evidence as follows:

My name is Edward G. Williams; residence, New York city; occupation, civil engineer; Chief Engineer of The New York Con-
26 tinental Jewell Filtration Company. I was the resident engineer in Washington in charge of the work on the tunnels which the plaintiff did for the Philadelphia, Baltimore & Washington Railroad Company. In connection with that work, I had in charge the transactions between the plaintiff and the District of Columbia, respecting that work. At the beginning of the work, the local negotiations were in charge of Mr. Parmelee for the Filtration Company, as consulting engineer, and the correspondence on those subjects was forwarded to me. I met in the matter the Commissioners, Colonel Biddle and Mr. Fernald. I saw them direct in some matters. Other matters went through the Filtration Company's New York office.

Thereupon the plaintiff, by its counsel, introduced in evidence the following letter, identified by the witness as having been directed on July 22, 1903, by Commissioner Biddle to the plaintiff's New York office and forwarded thence to the witness in Washington: the same being marked Plaintiff's Exhibit No. 1:

Office of the Engineer Commissioner of the District of Columbia.

WASHINGTON, *July* 22, 1903.

The New York Continental Jewell Filtration Company, New York, N. Y.

GENTLEMEN: Referring to our oral conversation of July 16, in which you requested that the sewer and water changes necessary on account of the construction of the tunnel of the Pennsylvania R. R. Company, this city, be made by this office, and the plat which you left with me, I would state that the estimated cost of making the changes in the sewers is $7,693.00, and of changes in water mains is $488. Deposit slips for these amounts are herewith and the deposits should be made separately, and upon receipt of the deposits the work will be done by this office. The Water Department made some modification of the plan suggested by you in the drawing which you left,

with the object of obtaining better circulation, and the Sewer Division increases the size and slope of the proposed new portion of sewer. I return your suggested plan.

Very respectfully,

JOHN BIDDLE,
Major, Corps of Engineers, U. S. A.,
Engineer Commissioner, D. C.

To the said letter are attached the following papers:

27 Office of the Engineer Commissioner of the District of Columbia.

Whole Cost.

WASHINGTON, *July* 21, 1903.

The N. Y. Continental Jewell Filtration Co.

DEAR SIRS: The estimated cost to you for making necessary changes in sewers caused by construction of tunnel N. J. Ave. & D street, S. E., is $7693.00. If you wish the District to do the work, please deposit said amount and this paper with the Collector of Taxes of the District of Columbia.

Very respectfully yours,

CHESTER HARDING,
Captain, Corps of Engineers, U. S. A.

D. E. M. E.
9179–212.

Office of the Collector of Taxes of the District of Columbia.

Received the above named amount.

____ ____,
Collector of Taxes, D. C.

Save this Receipt. Do not Detach.

You will be notified when the work is completed, and any unexpended balance of your deposit will be returned to you upon presenting this receipt to the Auditor, D. C.

Auditor's Coupon.

Whole Cost.

In accordance with estimate sent July 21, 1903, to The N. Y. Continental Jewell Filtration Co. for making necessary changes in sewers caused by construction of tunnel N. J. Ave. & D street, S. E., $7693.00 has this day been deposited with me.

____ ____,
Collector of Taxes, D. C.

9179–212.

Engineer's Coupon.

Whole Cost.

In accordance with estimate sent July 21, 1903, to The N. Y. Continental Jewell Filtration Co. of making necessary changes in sewers caused by construction of tunnel N. J. Ave. & D street, S. E., $7693.00 has this day been deposited with me.

____ ____,
Collector of Taxes, D. C.

9179–212.

28 Office of the Engineer Commissioner of the District of Columbia.

Whole Cost.

WASHINGTON, *July* 20, 1903.

The N. Y. Continental Jewell Filtration Co.

DEAR SIRS: The estimated cost to you for making necessary changes in water mains caused by construction of tunnel N. J. Ave. and D street, S. E., is $488.00. If you wish the District to do the work, please deposit said amount and this paper with the Collector of Taxes of the District of Columbia.

Very respectfully yours,

CHESTER HARDING,
Captain, Corps of Engineers, U. S. A.

9179–212.

Office of the Collector of Taxes of the District of Columbia.

Received the above named amount.

____ ____,
Collector of Taxes, D. C.

Save this Receipt.

You will be notified when the work is completed, and any unexpended balance of your deposit will be returned to you upon presenting this receipt to the Auditor, D. C.

Auditor's Coupon.

Whole Cost.

In accordance with estimate sent July 20, 1903, to The N. Y. Continental Jewell Filtration Co. for making necessary changes in water mains caused by construction of tunnel N. J. Ave. and D street, S. E., $488.00 has this day been deposited with me.

____ ____,
Collector of Taxes, D. C.

9179–212.

Engineer's Coupon.

Whole Cost.

In accordance with estimate sent July 20, 1903, to The N. Y. Continental Jewell Filtration Co. for making necessary changes in water mains caused by construction of tunnel N. J. Ave. and D street, S. E., $488.00 has this day been deposited with me.

——— ———,
Collector of Taxes, D. C.

9179–212.

29 And thereupon the witness continued his testimony as follows:

I was here on duty at the dates of the foregoing exhibits, and letters that passed between the Filtration Company and other persons, with reference to the tunnel work, came to me. This particular letter I received in the regular course of business from the New York office, with a request to report on the matter. To the best of my recollection, no plan accompanied the letter when it came to me.

Thereupon the plaintiff, by its counsel, introduced in evidence the following letter, bearing date July 24, 1903, identified by the witness as having been signed by Charles L. Parmelee, consulting engineer of the plaintiff, and addressed by him to Commissioner Biddle; and same was marked Plaintiff's Exhibit No. 2.

"The New York Continental Jewell Filtration Company,
General Contractors and Filtration Experts.
Office of the Consulting Engineer, 136 Liberty Street.

NEW YORK, *July* 24, 1903.

Major John Biddle, Corps of Engineers, U. S. A., Engineer Commissioner of D. C., Washington, D. C.

DEAR SIR: Your favor of the 22nd instant has been referred to me, and I am in turn referring it to Mr. E. G. Williams, our Resident Engineer on the ground. As soon as I receive his report I will recommend to the Company that the proper action be taken.

Yours respectfully,

CHAS. L. PARMELEE,
Consulting Engineer."

Thereupon the plaintiff, by its counsel, introduced in evidence the following letter, with a certain blue print attached thereto, bearing date July 23, 1903, identified by the witness as having been forwarded to him in Washington from the plaintiff's New York office, and the same was marked Plaintiff's Exhibit No. 3:

"Office of the Engineer Commissioner of the District of Columbia.

WASHINGTON, *July 23d*, 1903.

The New York Continental Jewell Filtration Company, New York, N. Y.

GENTLEMEN: Referring to a letter from this office dated the 22nd instant, through an error the wrong plan was sent you. I send herewith the proper one and have to request that you return the
30 one sent with said letter above referred to.

Very respectfully, A. Y. LAKEMAN,
Chief Clerk, Engineer Dept., D. C."

Thereupon the plaintiff, by its counsel, handed to the witness a certain blue print, and thereupon the witness continued his testimony as follows:

I received this blue print. I think it accompanied the letter. It was given me by the District officials or possibly was forwarded from the New York office. The records of the Filtration Company relating to the relocation of sewers and water mains were in my charge here in Washington.

And thereupon counsel for the plaintiff asked whether the plan referred to by the witness as the one submitted by him to the Engineer Commissioner was ever returned to the Filtration Company. To the said interrogatory counsel for the defendant objected and the objection was sustained. To the action of the court in sustaining the said objection, the plaintiff, by its counsel noted an exception, which was allowed.

And thereupon the witness continued his testimony as follows:

I was present and observed all the work that was done in the relocation of the sewer at the intersection of D Street and New Jersey Avenue. The general plan followed was that of a sewer well. A big manhole was built on the upgrade side of the tunnel, and the sewer was dropped underneath the tunnel and carried on a flatter grade until it intersected the old sewer again. The blue print which you handed me (being part of Plaintiff's Exhibit 3) is a water main plan furnished by the Water Department. There is a line in the center which might indicate the sewer. It is about in the position of the sewer. The only plan having reference to the sewer that I ever received was a cross-section of sewer.

Mr. THOMAS: So that there will be no confusion about it, here is the plan of the sewer.

By Mr. HAYDEN:

31 Q. Mr. Williams, I hand you a tracing; will you please state whether you recognize that as relating to the change in the sewer at New Jersey Avenue and D Street (handing witness paper)? A. Yes sir, that represents substantially the change.

Q. Did you ever see this plan before? A. No sir; that is a plan of it, not a profile.

Q. But from your knowledge of the work, you are able to state that that is a correct plan of the change that was made? A. Yes sir.

Mr. HAYDEN: I offer that in evidence and ask that it be marked "Plaintiff's Exhibit B."

Thereupon the witness continued his testimony as follows:

After the correspondence that I have identified, we accepted the District's offer to make the changes proposed in the water mains and sewers at New Jersey Avenue and D Street on our making the deposits mentioned by Colonel Biddle.

Thereupon the plaintiff by its counsel introduced in evidence the following letters, formal proof thereof being waived by the defendant, which were marked respectively plaintiff's exhibits 4 and 5.

PLAINTIFF'S EXHIBIT 4.

"#787.

Office of the Engineer Commissioner of the District of Columbia.

WASHINGTON, *July* 20, 1903.

The N. Y. Continental Jewell Filtration Company.

DEAR SIRS: The estimated cost to you for making necessary changes in water mains caused by construction of tunnel N. J. Ave., & D St., S. E. is $488.00. If you wish the District to do the work, please deposit said amount and this paper with the Collector of Taxes of the District of Columbia.

Very respectfully yours,

——— ———,
Captain, Corps of Engineers, U. S. A.

Office of the Collector of Taxes of the District of Columbia.

Received the above named amount.

E. G. DAVIS,
Collector of Taxes, D. C.
C. M. T., *Cashier.*

Save this receipt. Do not detach.

You will be notified when the work is completed, and any unexpended balance of your deposit will be returned to you upon presenting this receipt to the Auditor, D. C.

Collector of Taxes,
Paid Dec. 15, 1903.
District of Columbia."

32 PLAINTIFF'S EXHIBIT 5.

788.

Office of the Engineer Commissioner of the District of Columbia.

WASHINGTON, *July* 21, 1903.

The N. Y. Continental Jewell Filtration Company.

DEAR SIRS: The estimated cost to you for making necessary changes in sewers caused by construction of tunnel N. J. Ave. & D Sts., southeast, is $7693.00. If you wish the District to do the work, please deposit said amount and this paper with the Collector of Taxes of the District of Columbia.

Very respectfully yours,

CHESTER HARDING,
Captain, Corps of Engineers, U. S. A.

Collector of Taxes,
Paid
Dec. 15, 1903.
District of Columbia.

Office of the Collector of Taxes of the District of Columbia.

Received the above-named amount.

E. G. DAVIS,
Collector of Taxes, D. C.
C. M. T., *Cashier.*

Save this Receipt. Do not Detach.
You will be notified when the work is completed and any unexpended balance of your deposit will be returned to you upon presenting this receipt to the Auditor, D. C.

Thereupon the plaintiff, by its counsel, introduced in evidence the following letter, and the tracing which accompanied it, formal proof thereof being waived by the defendant; and the same was marked Plaintiff's Exhibit No. 6:

"Office of the Engineer Commissioner of the District of Columbia.

WASHINGTON, *Jan.* 18, 1904.

N. Y. Con. Filt. Co., # 23 D Street S. E., Washington, D. C.

GENTLEMEN: In accordance with your request I transmit herewith tracing showing changes in water mains recently made at D Street and New Jersey Avenue, S. E.

Very respectfully,

J. S. GARLAND,
Ass't Eng'r, Water Department.

Thereupon the witness continued his testimony as follows:

The changes that were made in water mains at New Jersey Avenue and D Street on or before January 18, 1904, are correctly shown on the plat forming part of plaintiff's exhibit 6. The abandoned mains lay in the path of the tunnels. We dug them out as we came up to them. The District did the work of making the connections outside the edges of the tunnel. The District did no work connected with the relocations of water mains within the area
33 of the tunnels. There were no water mains in that area. I myself deposited with the District of Columbia the amounts receipted for, as evidenced by exhibits 4 and 5.

Thereupon the plaintiff by its counsel introduced in evidence the following letter, formal proof thereof being waived by the defendant, and the same was marked Plaintiff's Exhibit No. 7:

APRIL 2, 1904.

Superintendent of the Water Department, Washington, D. C.

DEAR SIR: In accordance with our conversation of last week, we request your Department to make the necessary changes in water main at C St., S. E., between N. J. Ave. and 2nd St., where the First Street tunnel crosses C Street.

Yours truly,
(Signed) E. G. WILLIAMS,
Resident Engineer.

Thereupon the witness stated that he wrote said letter.

Thereupon the plaintiff, by its counsel, introduced in evidence the following letter, formal proof thereof being waived by the defendant, and the same was marked Plaintiff's Exhibit No. 8:

1340.

Office of the Engineer Commissioner of the District of Columbia.

WASHINGTON, *April* 21, 1904.

The N. Y. Continental Jewell Filtration Co.

DEAR SIRS: The estimated cost to you for making changes in water main in C Street S. E. bet. N. J. Ave. and 2nd Street, is $600.00. If you wish the District to do the work, please deposit said amount and this paper with the Collector of Taxes of the
34 District of Columbia.

Very respectfully yours,
CHESTER HARDING,
Captain, Corps of Engineers, U. S. A.

Collector of Taxes,
Paid
Apr. 22, 1904.
District of Columbia.

Office of the Collector of Taxes of the District of Columbia.

Received the above-named amount.

E. G. DAVIS,
Collector of Taxes, D. C.
M. O. C., JR.,
Ass't Cashier.

Save this receipt. Do not Detach.
You will be notified when the work is completed and any unexpended balance of your deposit will be returned to you upon presenting this receipt to the Auditor D. C."

Thereupon the plaintiff, by its counsel, offered in evidence a letter, dated May 11, 1904, and written by E. G. Williams, Resident Engineer of the plaintiff, addressed to the Commissioners of the District of Columbia. And thereupon the defendant, by its counsel, admitted that the said letter contained a demand for a statement of the account for the unexpended balance due the plaintiff, but objected to portions of said letter as containing self-serving declarations by the plaintiff. And thereupon, after argument, it was agreed that the defendant would withdraw its objection to the said letter, and that the court should protect the rights of both parties with respect to the same by instructions to the jury.

35 Thereupon the plaintiff introduced in evidence the said letter, formal proof thereof being waived by the defendant, and the same was marked Plaintiff's Exhibit No. 9:

"MAY 11, 1904.

The Honorable Commissioners of the District of Columbia, Washington, D. C.

GENTLEMEN: We have deposited with the Collector of Taxes of the District of Columbia at various times as ordered by the Commissioners the following amounts of money.

For sewer changes within the right of way of the First St. tunnel at New Jersey Ave. and D St. S. E., $7963.

For changes in water mains within the right of way of the First St. tunnel at New Jersey Ave. and D Sts. S. E. $488.

For changes in water mains within the right of way of the First St. tunnel at C St. S. E., between New Jersey Ave. and First St. $600.

As this work is now completed we respectfully request that a statement be rendered to us of the cost of this work, and the unexpended balance be returned to us.

Very respectfully,
(Signed) E. G. WILLIAMS,
Resident Engineer."

Thereupon the plaintiff by its counsel introduced in evidence the following letter, subject to instructions by the court similar to those to apply to Plaintiff's Exhibit No. 8, formal proof of said letter being waived by the defendant, and the same was marked Plaintiff's Exhibit No. 10:

"JUNE 1, 1904.

The Honorable Commissioners of the District of Columbia, Washington, D. C.

GENTLEMEN: Referring to our letter of May 11th, to which we have received no reply, we beg to recall to your attention our request for a statement regarding the cost of the several sewer and water pipe changes *within the right of way* of the First Street tunnel at N. J. Avenue and D St., S. E., and C St., S. E., between N. J. Avenue and First Street.

We have deposited with the Collector of Taxes of the District of Columbia to cover these changes, a sum of $8,781.00, with the understanding that on the completion of the work, a statement of cost was to be rendered us, and unexpended balance returned.

We therefore respectfully request that a statement of the cost of this work be rendered us, that we may obtain the unused portion now on deposit with the Collector of Taxes.

Very respectfully, E. G. WILLIAMS,
Resident Engineer."

Thereupon the plaintiff, by its counsel, introduced in evidence the following letter with attached vouchers, formal proof thereof being waived by the defendant, and the same was marked Plaintiff's Exhibit No. 11:

36 "Office of the Auditor for the District of Columbia.

WASHINGTON, *June* 21, 1904.

N. Y. Continental Jewell Filtration Co., 23 D Street S. E., Washington, D. C.

GENTLEMEN: Herewith find vouchers, in duplicate, which you will please receipt in accordance with paragraph 5 below. Upon their return to this office properly receipted, a check for the amount thereof will be mailed to you. Please also attach the Collector's receipts, covering this deposit, which you now hold.

J. R. GARRISON,
Auditor, D. C.

(Voucher.)

Collector's Certificate of Deposit No. 787. Amount, $488.00.
" " " " " 1340. " $600.00.

Office of the Engineer Commissioner, D. C.

WASHINGTON, *May* 6, '04.

SIR: The work of changing water mains in N. J. Ave., D and C — bet. N. J. Ave. and 2 — S. E. has been completed in accordance with the requirements of this Department at a cost to you of Ten hundred ten and 89/100 dollars ($1010.89). The balance of your deposit,

amounting to Seventy-seven and 11/100 dollars ($77.11) will be refunded to you by the Auditor, D. C., upon your signing the receipt below and surrendering the Collector's receipt which you now hold.

CHESTER HARDING,
Captain of Engineers.

To N. Y. Continental Jewell Filtration Co., 23 D St. S. E.

Examined and approved.

W. A. McFARLAND,
Sup't Water Dep't.

District of Columbia to —— ——, Dr.

For amount of unused balance of deposit — $ —.
Received payment by check on United States Treasury No. —.

—— ——.

Thereupon the plaintiff, by its counsel, introduced in evidence the following letter, formal proof thereof being waived by the defendant, and the same was marked Plaintiff's Exhibit No. 12:

"JUNE 23, 1904.

The Engineer Commissioner of the District of Columbia, District Bld'g, Washington, D. C.

DEAR SIR: We return herewith vouchers showing the total cost for changes in water mains on New Jersey Ave., D and C Streets, S. E., and respectfully request a more detailed statement from the Water Department showing the cost of this work.

Very respectfully,
(Signed) E. G. WILLIAMS,
Resident Engineer."

Thereupon the plaintiff, by its counsel, introduced in evidence the following letter, with attached vouchers, formal proof thereof being waived by the defendant, and the same was marked Plaintiff's Exhibit No. 13:

37 "Office of the Auditor of the District of Columbia.

WASHINGTON, *June* 20, 1904.

N. Y. Jewell Filtration Co., # 23 D Street S. E., Washington, D. C.

GENTLEMEN: Herewith find vouchers, in duplicate, which you will please receipt in accordance with paragraph 5 below. Upon their return to this office properly receipted, a check for the amount thereof will be mailed to you. Please also attach the Collector's receipt, covering this deposit, which you now hold. Herewith find detail statement of expenditures against this deposit.

J. R. GARRISON,
Auditor, D. C.

(Voucher.)

Collector's Certificate of Deposit No. —. Amount, $7693.00.
" " " " —. " $—.

Office of the Engineer Commissioner, D. C.

WASHINGTON, *June 20th*, 1904.

SIR: The work of making necessary changes in sewers caused by construction of tunnel at N. J. Ave. and D Street S. E. has been completed in accordance with requirements of this Department at a cost to you of Six thousand nine hundred and seventy & 13/100 dollars ($6,970.13). The balance of your deposit, amounting to Seven hundred twenty-two & 87/100 dollars ($722.87) will be refunded to you by the Auditor, D. C., upon your signing the receipt below and surrendering the Collector's receipt which you now hold.

CHESTER HARDING,
Captain of Engineers.

To The N. Y. Cont. Jewell Filt. Co.

F. M. H.

Examined and approved.

D. E. McCOMB,
Supt. of Sewers.

District of Columbia to The N. Y. Cont. Jewell Filt. Co., Dr.

For amount of unused balance of deposit $722.87

Received payment by check on United States Treasury No. —.

—— ——.

Thereupon the plaintiff by its counsel introduced in evidence the following letter, formal proof thereof being waived by the defendant, and the same was marked Plaintiff's Exhibit No. 14:

"E. D. 9179–684.

Executive Office Commissioners of the District of Columbia.

WASHINGTON, *July* 5, 1904.

Mr. E. G. Williams, Resident Manager, N. Y. Continental Jewell Filtration Co., 23 D Street S. E., City.

DEAR SIR: In response to your request for a statement and return of unexpended balance of deposits with the Collector of Taxes relative to the construction of 1st street tunnel, the Commissioners direct me to inform you that statement and refund certificates were forwarded to your company on June 29, 1904.

Very respectfully, W. TINDALL, *Secretary.*

38 Thereupon the witness identified a detailed statement received by the plaintiff in response to its request, from the Sewer Department of the District of Columbia, of the cost of sewer changes, and the same was introduced in evidence and marked Plaintiff's Exhibit No. 15. The said paper showed that the amount of deposit #788 was $7,693.00; that the amounts charged by the defendant against the said deposit were, in the aggregate, $6,970.13; and that the amount returnable by the defendant to the plaintiff, in accordance with the defendant's estimate, was $722.87.

Thereupon, by agreement of counsel, the plaintiff introduced in evidence the following letter, with accompanying detailed account, furnished by the defendant to the plaintiff at its request, of the disbursements claimed to have been made by the defendant in the relocation of water mains and by the defendant claimed to be chargeable to the plaintiff under deposits No. 787 and 1240; and the same was marked Plaintiff's Exhibit No. 16:

"Office of the Auditor of the District of Columbia.

WASHINGTON, *July 12th*, 1904.

Mr. E. G. Williams, Resident Engineer, N. Y. Continental Jewell Filtration Co., #23 D Street, S. E., Washington, D. C.

SIR: Your letter to the Engineer Commissioner D. C., under date of June 23, 1904, returning vouchers for refund of $77.11 on deposits Nos. 787 and 1340 and requesting detail statement has been referred to this office. I herewith return refund certificate and enclose detail statement prepared by the Water Department, D. C., covering the expenditures against these deposits. In order to have the unexpended balance of $77.11 returned, receipt the enclosed vouchers and return them to this office together with the Collector of Taxes receipts.

Very respectfully,

J. R. GARRISON,
Auditor, D. C."

The account accompanying said letter showed that the sum deposited under deposit #787 was $488.00; that under deposit #1340, $600.00; total $1,088.00; that the amounts charged by the defendant against the said deposit, were, in the aggregate, $1010.89, and the amount returnable by the defendant to the plaintiff, in accordance with the defendant's estimate, was $77.11.

39 Thereupon counsel for the plaintiff stated to the court that the defendant admitted that, on November 2, 1904, plaintiff's attorney directed a letter to the Commissioners of the District of Columbia, protesting against the account which they had submitted to the plaintiff and a part of the charges that they proposed to make against the deposit; that is to say, that the defendant was attempting to charge for work which the District of Columbia had done on the relocations outside of the right of way; that said letter is offered in evidence simply for the purpose of showing that the plaintiff protested against these deductions so made at that time, and that the charges were objected to; that the statement was made in said letter

to the Commissioners of the District of Columbia that the three deposits previously referred to had been made, aggregating $8,781; that the auditor of the defendant transmitted a voucher stating that the expenditures of the District chargeable to #788 to cover sewer charges amounted to $6,970.13, leaving a balance of $722.87 to be returned to the plaintiff under that deposit; that on July 12th, the said auditor transmitted to the plaintiff a voucher accompanied by an account, stating that the expenditures of the District chargeable against deposits #787 and 1340, covering work on water mains, amounted to $1010.89, leaving a balance of $77.11 to be returned to the plaintiff.

Thereupon counsel for the defendant made the following statement of the contents of said letter in addition to the statement of counsel for the plaintiff: "The work in question was necessitated by the construction of tunnels for the Philadelphia, Baltimore & Washington Railroad, required by act of Congress approved February 12, 1901, and February 28, 1903.

The COURT: It is agreed then that so much of the letter as you have spread upon the record shall be admitted; also the statement with regard to the substance of the letter and that the Filtration Company in that letter made a demand.

Thereupon counsel for the plaintiff stated to the court that counsel for both parties had agreed upon the account involved in the case, that is to say, that the plaintiff deposited $7693, to cover the estimated cost of changes in sewers; and $488 and $600 to cover the estimated cost of changes in water mains, in all $1,088, to cover the latter changes; that the portions of the work done by the District of Columbia in the relocation of the sewer and the relocations of the water mains within the right of way or space covered by the tunnels, were as follows:

On sewers	$1,565.41
Work on water mains	42.62
Total	1,608.03

That, being deducted from $8,781, the total amount deposited by the Filtration Company, would leave, as the unexpended balance $7,172.97. But, on the other hand, if the contention of the defendant be correct, and the plaintiff was chargeable with the cost of the work done on the outside as well as inside the right of way, then the deductions which the defendant is entitled to make are as follows:

From deposit #788, $6,680.32, leaving a balance of $1,012.68.

And from the two deposits to cover work on water mains, #787 and 1340, amounting to $1,088, there should be deducted $1,010.89, leaving an unexpended balance of $77.11.

Total balance returnable, $1,089.79. That no sum has been returned to the Filtration Company.

Thereupon the defendant by its counsel assented to the correctness of the foregoing statement.

Thereupon the witness testified that the work done by the defend-

ant in the relocation and change of the sewer at the intersection of New Jresey avenue and D Streets southeast consisted of carrying the sewer construction across the right of way.

41 Thereupon the witness made a sketch, illustrating the work done by the defendant within the tunnel area which was introduced in evidence, marked Plaintiff's Exhibit No. 17.

Thereupon the witness continued his testimony as follows:

There was a length of 64 feet of sewer that the District constructed within the tunnel lines, crossing the tunnel diagonally. The old sewer was removed by us in our excavation for the tunnel. The work done by the District consisted of excavation for the new sewer below the grade of the tunnel and the construction of the new sewer.

Thereupon, the examination in chief being concluded, the witness, on cross-examination by counsel for the defendant, continued his testimony as follows:

I came to Washington in the latter part of June, 1903. I did not have the communications with Colonel Biddle mentioned in the letter of July 22nd. We established an office at No. 23 D Street Southeast. That was a short distance, possibly 100 feet from the corner. The actual construction of the tunnel was begun in the fall of 1903. Before our company entered into a contract with the railroad company, some preliminary work had been done on buildings and fences. I cannot state whether any work had been done on the actual tunnel excavation. We built the tunnels under the authority of our written contract with the railroad.

Q. Was there any work done on removing the sewer or water main at New Jersey Avenue and D Street, before you put up the deposit? A. No. Sir.

Mr. HAYDEN: I move the court to strike out the question and answer on the ground that they are immaterial.

Thereupon the court overruled the said motion. To the action of the court in overruling the said motion, the plaintiff, by its counsel noted an exception, which was allowed.

42 Thereupon the witness continued his testimony as follows:

I do not recall that I had any negotiations with the Commissioners before I made the deposits, regarding the plan of what was to be done by them. I think I took up the later deposit of $600 on the water main with Mr. Macfarland and Mr. Garland of the Water Department. When I received the plan of July 18, 1903, made by the water department, I saw, as an engineer, where the work was to be. That plan showed that the water mains within the tunnel were to be abandoned and that the water main crossing the north side of New Jersey Avenue was to be abandoned. It showed a new water main northwest of the tunnel from a point in D Street to a point in the east side of New Jersey Avenue. This work was all outside the tunnel. It also showed southeast of the tunnel a new 6-inch water main, running across New Jersey Avenue to about the centre line of D Street, and that a portion of the water main which ran through where the tunnel was to go to the line

crossing the center of D Street, was to be abandoned. Before the tunnels were constructed the sewer came down D Street and 64 feet of it passed through the space the tunnel was to occupy. When the changes were made the sewer was dropped down in the tunnel well and was underneath and joined to the sewer again later on. That necessitated construction outside the right of way. It was necessary to adopt some such plan. Before the deposits were made I saw the water main plan, but not the sewer plan and knew in a general way, as an engineer, what was to be done. I knew that it would be necessary to change the grade of the sewer for some distance below the tunnel.

Thereupon the defendant by its attorney propounded to the witness the following question:

"Did you object, to the Commissioners of the District of Columbia, before you put up this money, that this was only to pay for the change within the tunnel way?"

And to the said question the plaintiff, by its counsel, objected, and the court sustained the objection. To the action of the
43 court in sustaining the said objection the defendant, by its counsel, noted an exception, which was allowed.

Thereupon the defendant, by its counsel, propounded to the witness the following question:

"Q. You knew, before you made this deposit and at the time you made it, what the cost would be to take away 64 feet of sewer and put it back, did you not?"

And to the said question the plaintiff, by its counsel, objected, and the court overruled the said objection. To the action of the court in overruling the said objection, the plaintiff duly noted an exception, which was allowed. Thereupon the witness continued his testimony as follows:

We knew that the estimated amount was excessive for that which was solely within the right of way but we considered that we were protected in the matter by the law. I did not know the cost of taking out 64 feet of sewer and putting it back. I had no estimate on it. I consider $7693 for taking out 64 feet of sewer an excessive amount. I did not know that it could be done within $1600. I made no estimate at all. I know that the total estimate submitted was largely in excess of the cost of work required within the right of way.

Thereupon the defendant, by its counsel, propounded to the witness the following question:

"Q. It does not require figures to make an estimate showing that $7692 was very much more than was necessary and I want you to give me some idea about what you know, as a practical engineer, the excessive cost must be when you made your deposit?"

And to the said question the plaintiff, by its counsel objected and the court overruled the objection. To the action of the court in overruling the said objection, the plaintiff, by its counsel, duly noted an exception, which was allowed. Thereupon the witness continued his testimony as follows:

It was largely in excess, 50 per cent. or more, but I only looked

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at it in a general way. I did not know it was 80 per cent. more, and did not figure out the actual or approximate cost. When we asked the District of Columbia to do the work, we knew we should
44 have to make this deposit, both as to the water main and the sewer, covering the work within the right of way. I saw the work going on outside the right of way. I was there daily. The sewer work begun in January 1904 and the water main work about the same time. The sewer and water main work at New Jersey Avenue and D Street was completed late in March or very early in April. The second water pipe work on which the $600 deposit was made was completed, I think, in May. My answers with regard to the sewer deposit and first water main deposit would be the same with reference to the second water main deposit with the addition that the work on the first two had been completed before we deposited the last $600. Before putting up the $600 we had made no demand on the District for the money which we claimed had been expended outside the right of way. We made no demand on the District until May 11th. The work had then been completed. Before putting up the money, I think I had been referred to the act of 1901. My agency for the Filtration Company commenced the latter part of June 1903. Papers began to be forwarded to me from New York as soon thereafter as there were any to be forwarded.

Thereupon the defendant, by its counsel, propounded to the witness the following question:

"Q. Did you, at any time, know of an understanding between the railroad and your principal in reference to your taking care of passenger railways, sewers and water pipes, which were met in the construction of the tunnel?

To which question the plaintiff, by its counsel, objected, and the court overruled the objection. To the action of the court in overruling the said objection the plaintiff reserved an exception, which was allowed. Thereupon the witness continued his testimony as follows:

I knew of the agreement in regard to those matters embodied in the contract of December 10th. I acquired that knowledge shortly after the contract was executed.

Thereupon the parties by their respective counsel made the following stipulation:

45 The plaintiff admits that the letter of April 30, 1903, written by Mr. William H. Brown, Chief Engineer of the Pennsylvania Railroad Company to Colonel John Biddle, Engineer Commissioner of the District of Columbia, bears the genuine signature of the Chief Engineer.

Thereupon the defendant, by its counsel propounded the following question to the witness:

"Q. Prior to the execution of the contract, had you any knowledge that there was an agreement between the Railroad Company and the plaintiff or the railroad company and the District, that the plaintiff was to be at the whole expense of taking care of passenger railways, sewers or water pipes, or anything else that they met during the construction of improvements in this tunnel?"

To which question the plaintiff by its counsel objected, and the objection was overruled. To the action of the court in overruling the said objection, the plaintiff noted an exception, which was allowed.

Thereupon the witness continued his testimony as follows:

There was a memorandum of agreement which was refused by the Filtration Company on account of its terms in regard to some of those matters you have mentioned, which was forwarded to the Filtration Company in, I think, July 1903, but there was no definite agreement on any of these subjects that I know of until the contract was executed. I knew of no agreement between the railroad and the District. There was a preliminary draft of an agreement between the plaintiff and the railroad company, which was refused by the plaintiff and was not entered into. The plaintiff and railroad company subsequently came to an agreement which was embodied in the contract of December 10th.

Thereupon the defendant by its counsel propounded the following question to the witness:

"Q. Had any tunnel construction commenced before December 10, 1903?"

46 To the said question the plaintiff by its counsel objected and the court overruled the objection. To the action of the court in overruling the said objection, the plaintiff noted an exception which was allowed.

Thereupon the witness answered that as to actual operations, he did not remember.

And thereupon, on re-direct examination by counsel for the plaintiff, the witness continued his testimony as follows:

I had no knowledge of any understanding or agreement with respect to relocations or changes between the District of Columbia and the Philadelphia, Baltimore & Washington Railroad Company, prior to the transactions with the District which form the subject matter of this suit. The only agreement or attempted agreement prior to that of December 10th between the Filtration Company and the railroad was one considered in the early part of July 1903, before the 15th. That was submitted by the railroad to the Filtration Company and rejected by the Filtration Company on account of certain provisions.

And thereupon, in order further to maintain the issues on its part joined, the plaintiff produced as a witness Charles Lester Parmelee, who, having been first duly sworn, gave evidence as follows:

On examination in chief by counsel for the plaintiff, the witness testified as follows:

I reside in Orange, New Jersey, and have been a consulting engineer for about fifteen years. During the years 1903 to 1906, I was consulting engineer for the New York Continental Jewell Filtration Company, taking a general advisory part in the work of the reconstruction by the Filtration Company of tunnels for the Philadelphia, Baltimore & Washington Railroad Company. I conducted the early negotiations of the Filtration Company with the railroad and with the municipal authorities in this city. I think I

47 have seen the letter directed to the Filtration Company by Commissioner Biddle (Exhibit 1). Before this letter was

written I think I had an interview with Colonel Biddle concerning the relocation of water mains and sewers, about the middle of July 1903. I do not recall the conversation clearly. We talked over what was necessary to be done in connection with the tunnel, also the disposal of dirt. To the best of my recollection, I left Colonel Biddle, or Colonel Biddle called in the gentleman in charge of the sewer work and we went around into his office. I do not recall his name. We looked over the plans of the existing sewers, and I think that some sketches were made of a possible inverted siphon under the tunnel, and some discussion was had as to the possibility of doing that. I do not recall making any formal plan or having one made. I think those sketches were submitted to the Commissioners. I do not recall submitting any formal plan. I had but one interview that I recall in this matter, and recall no mention of the extent of the work that the Filtration Company was obligated to do or pay for in the matter of relocating sewers and water mains. I am under the impression that some one else was present in Colonel Biddle's office at the time of the interview to which I refer. I had no other interview with any District official about these locations, so far as I recall.

Thereupon, on cross-examination by counsel for the defendant, the witness continued his testimony as follows:

I do not recall making any such sketch as the plat dated July 18, 1903, Water Department, D. C., nor plaintiff's Exhibit No. 3, which is apparently a blue print of the tracing dated July 18th; nor Exhibit A No. 4, the sewer drawing.

And thereupon the plaintiff rested.

And thereupon it was stipulated in open court by and between the parties by their counsel, in order to avoid recalling the witness E. G. Williams in rebuttal in the event that the defendant should offer in evidence a certain letter of W. H. Brown, chief engineer of the Pennsylvania Railroad, to the Commissioners of the District
48 of Columbia, bearing date April 30, 1903, and in the event that the same should be admitted in evidence by the court, that the said Williams would testify that the contents of that letter were not communicated to the plaintiff until November 14, 1904, when the said Commiissioners directed to plaintiff's counsel a letter in which an extract from the letter of said Brown was quoted.

And thereupon, in order to maintain the issues on its part joined, the defendant offered in evidence the contract between the plaintiff and the Philadelphia, Baltimore & Washington Railroad, bearing date December 10, 1903, for the construction of the tunnels hereinbefore referred to; the permit issued under date of September 10, 1903, by H. M. Woodward, permit clerk, D. C., to the Philadelphia, Baltimore & Washington Railroad Company for the construction of the said tunnels; and the letter of W. H. Brown, Chief Engineer of the Pennsylvania Railroad to the Commissioners, dated April 30, 1903.

To the admission of the said contract, permit and letter, and each of them the plaintiff by its counsel objected, on the ground that the same were irrelevant and immaterial, and the objection was argued by counsel, and thereupon the court announced its ruling upon the

said objections, overruling the objection to the admission of the said contract and permit on the ground that Section 9 of the act of 1901 could not be treated as part of the plaintiff's contract with the defendant and further that viewed either as an independent contractor or as the agent of the Philadelphia, Baltimore & Washington Railroad Company, the funds deposited by the plaintiff with the defendant were alike chargeable with the cost of the work of relocations and changes in sewers and water mains, without as well as within the railroad company's right of way, and that the plaintiff was only entitled to recover the unexpended balance of these funds, after the payment of the total cost of the work, namely, $1089.12, with interest from June 21, 1904.

To the action of the court in overruling the objections to the admission of said contract and permit the plaintiff by its counsel duly noted exceptions, which were allowed.

49 And thereupon the court sustained the objection to the admission of the said letter of W. H. Brown on the ground that the same was not communicated to the plaintiff until after all work on said relocations was completed, namely, until November 19, 1904.

The said permit and the said contract are as follows, and are inserted at length at the instance of the defendant and not of the plaintiff, in accordance with the defendant's right to have the same inserted at length, pursuant to paragraph 5 of Rule V of the Court of Appeals of the District of Columbia, the cost of inserting the same to be awarded as the matter so incorporated may be deemed proper or not by said Court.

50 *The Permit.*

SEPTEMBER 10, 1903.

Permission is hereby granted the Philadelphia, Baltimore and Washington Railroad Company to construct a double track tunnel and approaches, as authorized and required by Act of Congress, approved February 28th, 1903, commencing at a point of the railroad *od r*he P. B. & W. R. R. Co., at or near the crossing of second street, southwest, with a viaduct at the elevation of said railroad, provided for in the Act of Congress (No. 49) approved February 12th, 1901, crossing over Virginia Avenue, Sq. 582, First street southwest, Sq. 638, Delaware Ave. southwest, Sq. 640, Canal and South Capitol Streets, to and through square 693, thence in tunnel, from its portal at the northeast corner of Sq. 693; passing under New Jersey Ave. and D Street, southeast, on a curve through Sq. 692, crossing under C Street southeast, still curving through square 690, to the intersection of First and B Street-, Southeast, thence on the west side of, and under First Street east, to E street, north, thence to a connection with the tracks of the terminal in the Union Station to be erected at Delaware and Massachusetts avenues, northeast.

Also for the purpose of transporting construction materials, disposal of excavation, etc., to construct and operate by steam or electric power, a temporary standard gauge surface track from the tunnel portal in Sq. 693 to the connection with the tracks of the P. B. & W. Railroad Co. at Virginia Ave., east of South Capitol street, cross-

ing Canal and South Capitol streets and through the bed of the east roadway of South Capitol street to Virginia Ave.

Also to construct a temporary narrow gauge construction track to be operated by electric power, from the tunnel portal in square 693, to Half and Q streets, southeast, passing over Canal street into the east roadway of South Capitol street, thence south to G street, thence on the east side of the roadway of South Capitol Street to K Street, thence by a curve into K street, thence on the center line of K street to Half street, east, thence by a curve to the west sidewalk and parking space of Half street, thence south on the west sidewalk and parking space of Half street southeast to N street, thence by reverse
51 curve across N street into the center line of Half street, thence south on said center line to Q street; the track to be elevated from the tunnel portal in square 693 to I street and on the surface from I street, southward, conforming in alignment and grade to the plans submitted and approved by the Commissioners of the District of Columbia and filed in the office of the Engineer of Highways.

Also, to erect a temporary pile wharf in the Anacostia River on the line of Q street southeast, so constructed as not to interfere with the flow and current of the river, and not exceeding 85 feet in width so as to be wholly within the limits of Q street; also, it must not extend further east than 500 feet from the center line of Half street, so as not to project beyond the wharf line as established by law.

Also to do such excavating and dredging, adjacent to said wharf as may be necessary to its usefulness.

Also to construct and operate by steam or electric power, such switches, turnouts, and sidings, etc., as may be necessary to connect the wharf and track on Half street, as authorized above, and to expedite the handling of materials.

Also, for the temporary occupation of so much of the public space in the vicinity of Half and Q streets, southeast, as may be necessary for the storage of materials and as may be available for the purpose under the following conditions;

That portion of the line of temporary tracks passing through paved or improved surfaces shall be constructed with the top of the rail at the grade of the pavement or improved surface and the space between rails and one foot exterior thereto shall be planked, boarded or otherwise paved so as to provide and afford comfortable and safe crossing for persons and vehicles; where the surface is unimproved, planked or paved crossings must be maintained between parking lines at all street crossings.

In the operation of all surface tracks, watchmen and flagmen must be employed to warn the public of the approach of all motors, cars or trains at street intersections or elsewhere, where necessary,
52 as directed from time to time by the Engineer Commissioner or his agents.

No work is authorized under this permit the detailed plans of which have not been approved by the Commissioners of the District of Columbia, nor is any procedure authorized hereunder that shall operate to close any street, alley or way provided by law to be closed, unless all of the property abutting on the portion of such street,

alley or way provided to be closed shall have been first acquired as provided by law.

All work shall be done in accordance with the plans approved by the Commissioners of the District of Columbia, at the risk and expense of the Philadelphia, Baltimore & Washington Railroad Co. and the responsibility for any and all accidents and damages to persons and property directly or indirectly resulting from, due to, or connected with the construction, maintenance or operation of the work, whether done by the P. B. & W. R. R. Co., or others in connection with it, shall be assumed by the Philadelphia, Baltimore & Washington Railroad Company.

All work shall be so arranged and conducted as to inconvenience the public as little as possible, and suitable and sufficient means must be employed to maintain and protect travel on all intersecting and adjacent streets and highways, by providing such roadways, bridges, fences, barricades, lights and watchmen as may be necessary in the opinion of the Commissioners of the District of Columbia, to afford the least inconvenience and danger to persons and property and the Police Regulations governing the storage, lighting and protection of materials in the public space shall be fully observed, as will also the application of these regulations to the general conduct of the work.

No blasting will be permitted under this permit and no explosives of whatever nature or intended purpose shall be stored upon the work, but, should it become necessary to use explosives, special permits in each case must be obtained before any such work is done;

53 all steam generators or boilers, or compressed air receivers or reservoirs, or locomotives or motors, shall be tested for pressure and serviceability, as provided for by law, before being put into service, by the District Inspector of Boilers, and his certificate of serviceability shall be kept upon the work and be readily accessible.

No dynamo furnishing power for any purpose shall have either of its poles connected to the earth, directly or indirectly, and if the trolley system is installed upon the work or any part of it, a return wire similar in capacity, situation, and insulation to the feed wire shall be used, and no current must be grounded by conduction through the rails or otherwise; also, so much of Part 3 of the Building Regulations of the District of Columbia, in effect March 1st, 1902, as is consistent with and applicable to, the operation and control of electric currents and wiring, shall be strictly observed.

Temporary sheds for office purposes and for the storage of tools and materials may be erected if necessary but not within thirty (30) feet of any dwelling or brick building. No shed, building or other structure shall be erected or maintained for habitation unless admitted to be a tenement or lodging house by the Philadelphia, Baltimore & Washington Railroad Co. and thereby subject by intent to all the conditions of light, heat and ventilation provided for and required for such buildings by the Health and Building Regulations of the District of Columbia, except as specially modified by the Commissioners, and any buildings used for such purposes by the

Philadelphia, Baltimore & Washington Railroad Company, its agents, or its contractors, will be considered such tenement or lodging house.

All temporary buildings shall be removed by the railroad company at any time after thirty (30) days' notice to do so by the Commissioners of the District of Columbia.

Conveniences properly secluded from public observation, for all employees engaged upon the work, must be provided by said railroad company, of such construction and in such location as to insure perfect sanitary condition, and the laws and regulations relating to the public health of the District of Columbia must be fully observed in all respects.

Temporary ventilating shafts may be constructed at loca-
54 tions to be hereafter approved and they shall not exceed six feet in diameter and be strongly braced and suitable barricaded and at night sufficiently lighted to insure safety to persons and vehicles.

Such temporary tracks as may be necessary to the prosecution of the work may be installed within the right of way of said Railroad Company, also such derricks, boilers, engines and other machinery for construction purposes but they must be so arranged and constructed as not to be an impediment to travel or dangerous in their operation to either persons or property and in the use of them, the public shall be as little inconvenienced as possible.

All oil and inflammable materials, in store, must be isolated and suitably protected to avoid danger to abutting property.

All construction material and public property of whatever nature taken out of the street and not previously paid for by the Railroad Company, shall be disposed of as the Engineer Commissioner of the District of Columbia shall direct, and any such material or property, destroyed or unaccounted for, must be paid for or replaced by the Philadelphia, Baltimore & Washington Railroad Company, and no sewer, water or lighting fixtures or appurtenances to the premises of any abutting property shall be disturbed or destroyed, until provision has been made by said Railroad Company for continuing such service, it being the intention hereby that no property shall be deprived of any such privilege now enjoyed.

Inspectors representing the Commissioners of the District of Columbia and appointed for the purpose, shall have access to the work at all times. They will look after the public interests and convenience and also see that the laws, regulations and ordinances of the United States and District of Columbia are complied with, and it shall be their duty to invite attention to any neglect, oversight or disregard of the terms of this permit, and to insist upon their enforcement.

The Philadelphia, Baltimore & Washington Railroad Company shall deposit with the collector of taxes of the District of Columbia the sum of three thousand dollars ($3,000), and such further sums from time to time as may in the opinion of the Commis-
55 sioners of the District of Columbia be necessary to defray such expenses as may be incurred by the District of Columbia in making good all damages to any District work injured and

in restoring all pavements disturbed by changes made in connection with said work; provided, that when the work is completed, such amount as shall not have been expended shall be returned to said Company within ninety days, with a complete itemized statement of all expenditures made in full. Restoration of and repairs to pavements, etc., and all other municipal property will be done by the District of Columbia, or its agents and the cost of the same will be charged to this deposit.

This permit shall be limited to one year from date of issue, but may be extended by the said Commissioners beyond that date. It is subject to suspension or revocation at any time, should cause for such action appear to the Commissioners. In the execution of the work hereunder all laws and regulations of the United States and of the District of Columbia shall be strictly observed.

This permit shall not be effective until accepted in writing by the Railroad Company.

By order of the Commissioners of the District of Columbia.

(Signed) H. M. WOODWARD,
Permit Clerk, D. C.

The Philadelphia, Baltimore & Washington Railroad Company hereby accepts the conditions of the foregoing permit.

(Signed) ——— ———.

56 *The Contract.*

This agreement made this tenth day of Dec. in the year of our Lord one thousand nine hundred and three (A. D. 1903) by and between the New York Continental Jewell Filtration Company, a Corporation, party of the first part, hereinafter called "Contractor", and the Philadelphia, Baltimore and Washington Railroad Company, a Corporation, hereinafter called "Railroad Company", party of the second part:

Witnesseth, that the Contractor agrees with the Railroad Company, for the consideration hereinafter named, to furnish all material and provide all labor necessary for, and construct, finish and deliver within four hundred (400) working days, two (2) Tunnels, parallel and contiguous each to the other, with room for one (1) track in each tunnel, in the City of Washington, in the District of Columbia, beginning at and including the south portal just south of the southwest house lines of D Street and New Jersey Avenue southeast, thence passing under the intersection of these streets and through railroad and government property and the western half of First Street southeast to the south side of B Street southeast, thence under the west side of First Street to the north side of C Street northeast, and thence continuing under the west side of First Street to the north side of D Street northeast (but not including a portal at the north end of the tunnels), all in strict accordance with the specifications and plans hereto attached (said plans being marked Exhibits "A," "B" and "C") and made a part of this contract. The portions of the work between the said south portal and the south side of B Street southeast, and between the north side of C Street northeast

and the north side of D Street northeast, may be built by the "cut and cover" process; and the portions of the work between the south side of B Street southeast, under the west side of First Street to the north side of C Street northeast, to be built as a driven tunnel.

The above specified period of four hundred (400) working days shall begin immediately after the contract shall have been finally approved by both parties; notification shall have been given
57 by the Railroad Company to the contractor to proceed with the work, and the contractor shall have been provided with adequate authority for the continued use of the necessary grounds of the Railroad Company for construction purposes as hereinafter set forth.

Said Railroad Company hereby agrees, in consideration of the foregoing and of the performance of the agreements herein contained on behalf of the contractor, to pay said contractor for each lineal foot of completed twin tunnel section Two Hundred and Sixty-four (264) Dollars; and in addition thereto if so ordered by the Chief Engineer, for archways in the central wall, spaced one hundred (100) feet centre to centre of archway, as shown on Exhibit "B," the further sum of Five (5) Dollars and Seventy-five (75) Cents per lineal foot of finished tunnel; for electrical wire ducts, as shown on Exhibit "B," the further sum of Twelve (12) Dollars and Sixty-five (65) Cents per lineal foot of finished tunnel; (for each manhole for electrical wire ducts, as shown on Exhibit "B," the further sum of Five Hundred (500) Dollars.

For all work outside of main tunnel, and for work and material not shown on Exhibit "B," including south portal of the tunnel, the Railroad Company agrees to pay to said Contractor the following prices, to wit:

For excavation in open cut, One Dollar and Fifty Cents ($1.50) per cubic yard. For extra excavation in driven tunnel, Three (3) Dollars per cubic yard.

For concrete in open cuts, Seven (7) Dollars per cubic yard. For extra concrete in driven tunnel, Ten (10) Dollars per cubic yard.

For brick rings of arches, Sixteen (16) Dollars per cubic yard.

For cut stone piers of sandstone under Government Building, Twenty (20) Dollars per cubic yard.

For waterproofing in open cut, including cement or brick covering, Thirty (30) Cents per square foot. For waterproofing in driven tunnel, Fifty (50) Cents per square foot.

For single terra-cotta ducts, in place, together with iron straps and supports, as shown on detailed plan, Twenty (20) Cents per lineal foot.

For four-inch cast iron drain pipe, in place, One Dollar and Fifty Cents ($1.50) per lineal foot, the price per lineal foot to include necessary bends and "T" connections.

58 For twelve-inch cast iron drain pipe, in place, Three (3) Dollars per lineal foot, the price per lineal foot to inc-ude necessary bends and "T" connections.

For each set of ¾-inch iron steps on bench walls, Ten (10) Dollars.

For set of cast iron drain plates and seats for same alongside of track in the tunnel floor, Twenty (20) Dollars.

For granite facing of south portal and wing walls and for granite arch ring, Fifty (50) Dollars per cubic yard.

Provided, that all material is to be measured in place and the payments are to be made on or before the fifteenth day of each month upon estimates for work done during the preceding month, the Railroad Company to retain ten per centum of the amount of the estimates until the work shall have been finally completed according to the contract and specifications and accepted and until after the expiration of the period of three (3) months allowed by the laws in force in the District of Columbia for the filing of Mechanics' liens. Provided further, that no extra price shall be paid for overhaul and that no men or materials shall be transported free on account of this contract by said Railroad Company, and that no claims for extra work shall be allowed unless such work shall have been specially contracted for in writing by the Chief Engineer of the Railroad Company. Provided further, that payments shall only be made upon the certificate of the Engineer of the Railroad Company in charge of the work, but the giving of such certificate shall in no way lessen the responsibility of the contractor to replace work not according to the contract and specifications or not satisfactory to the said Chief Engineer.

It is further agreed by and between the parties hereto:

I. The Contractor is to provide all manner of labor, materials, apparatus, machinery, appliances, power, light and all other things needful or necessary for the performance of the work in strict accordance with the attached drawings and specifications forming a part of this contract and to the satisfaction of the Chief Engineer of the Railroad Company, and shall make no sub-contract for the work upon said tunnel, excepting for the delivery of materials, without the consent, in writing, of said Chief Engineer.

59 All work to be done under the supervision of the Engineer of Construction or Assistant Engineer in charge of the work (Engineer of Construction or Assistant Engineer herein and in the attached specifications being designated Engineer unless otherwise noted), who shall decide all questions which may arise as to the quality and sufficiency of materials; the character and correctness of the work, and the payments therefor, and should the Contractor and said Engineer fail to agree thereon, then said Contractor may apply to the said Chief Engineer, whose decision shall be final. During the time any such question may be under consideration by said Chief Engineer, the work shall go on unless said Chief Engineer direct that it be suspended. The contractor shall at all times tender all necessary and sufficient facilities to said Chief Engineer and Engineer, or their authorized representatives, for the proper inspection of the work and materials, and shall remove any incompetent workman upon being directed so to do by said Engineer. The contractor shall deliver over the tunnel to said Railroad Company in a perfect, clean and serviceable condition when completed.

II. The contractor shall put up and maintain such barriers and warning signals as should effectually prevent any accident in conse-

quence of his work, for which the Railroad Company, the United States, the District of Columbia, or any of them, may become liable, and the Contractor shall hold and save harmless the Railroad Company, the United States, and the District of Columbia, or any of them, from any and all damages occasioned in any way by its acts or neglects, or that of its agents, employés or workmen, in connection with the execution of the work herein provided for, provided, however, that the contractor shall not be responsible for any consequential damage or liability due to the construction of said tunnels.

III. The Contractor agrees, at its own cost and expense, to take care of and provide all necessary false work, machinery and appliances and labor for sustaining, guarding, removing, changing or altering all water mains and gas pipes, sewers, passenger railway tracks and railway, telephone, electric light and other conduits, and any other lawful obstruction which it may encounter in doing the work upon the tunnels, and also for supporting and sustaining the streets, avenues, sidewalks and alleys over said tunnels and all buildings and structures thereon and traffic thereover, and also agrees to obtain from the proper authorities of the District of Columbia the necessary permits to make any changes which may be necessary in said streets, avenues, alleys or sidewalks, or in the location of said water mains and gaspipes, sewers, tracks and conduits, and after the completion of said tunnels agrees to restore the streets, avenues, sidewalks and alleys which may be interfered with by the construction of the same to the condition in which they are at present, to the satisfaction of the Commissioners of the District of Columbia, within sixty (60) days after the date when said tunnels shall have been completed. Provided that the Contractor shall not be called upon to regrade any streets, avenues, sidewalks or alleys whose present grade is below the line of the top of the tunnels.

IV. Should the Contractor, in the judgment of the said Chief Engineer (which shall be final and conclusive), at any time during the progress of the said work become insolvent or cause or permit any neglect or suspension of work, or refuse or neglect to supply a sufficiency of materials or workmen or fail or refuse to correct or remove any work condemned by the said Chief Engineer or the Engineer in charge of the work, or fail to comply with any of the provisions of this contract, or any of the terms of the specifications or plans forming a part thereof, the Railroad Company shall have the right and power to immediately enter upon and take possession of the premises and work upon said tunnel, and may terminate this contract after giving thirty (30) days' notice, in writing, delivered to the Contractor, or at its place of business, whereupon all claims of the contractor upon the Railroad Company shall cease and said Railroad Company may provide materials and workmen to complete the work upon the said tunnels, and the expense of said notice and of completing said work shall be deducted from the amount due or to become due to said contractor under this contract; and in the event of such insolvency, neglect or default upon the part of said contractor, and the taking possession of the tunnels and work by said Railroad Company, no false work, scaffolding, machinery, apparatus,

tools or appliances shall be removed, so long as the same may be required by said Railroad Company to complete said work; *provided*, if any balance of the amount payable under this contract remains after such insolvency, neglect or default by said contractor, and the completion of said work by said Railroad Company, then the same shall belong to said contractor or the persons or corporations legally representing it, but the Railroad Company shall not be liable or accountable in any way for the manner in which it may have had the work upon the tunnels completed or the prices that it may have been required to pay for labor and materials.

V. Should the Railroad Company at any time during the progress of the work upon said tunnels require any alteration in or addition to said work, it shall have the power to make such changes without in any way affecting the obligations of the parties under this contract, but the additional cost, if any, of such changes shall be agreed upon, in writing, between said contractor and the Chief Engineer of said Railroad Company, which agreement shall state the extension of time, if any, which is to be granted by reason thereof.

VI. If from any cause it should be found necessary by said Railroad Company to postpone or entirely suspend the work herein contracted for, the Railroad Company reserves the right to stop the work on this contract by its Chief Engineer giving thirty (30) days' notice of the same, and giving the said contractor a final estimate for all work done to that date.

VII. At the time of the execution and delivery hereof, the contractor agrees to furnish to the Railroad Company a bond of indemnity in the sum of One hundred thousand (100,000) Dollars, with good and sufficient surety, to be satisfactory to the Railroad Company, to indemnify and save harmless said Railroad Company
62 on account of any and all matters growing out of the performance of this contract by said contractor and to secure the faithful and prompt performance of this contract and all duties and obligations imposed upon the contractor hereunder.

VIII. The Railroad Company hereby agrees to furnish at its own expense, for the use of the Contractor, the materials for a single track railroad siding from the Philadelphia, Baltimore and Washington Railroad to a connection with the proposed line of the tunnel ending approximately at the south portal thereof. But the contractor shall, at its own expense, do all grading and tracklaying necessary for this siding and shall maintain the same in good condition for operation during the continuance of this contract, and at the completion thereof shall restore all streets or premises to their original condition.

IX. The Railroad Company shall provide without charge to the contractor at the portal of the tunnels, or at such other point as may be hereinafter mutually agreed upon, sufficient gravel trains upon which the contractor may load the excavated material from the tunnel and south approach thereto.

The Railroad Company further agrees to transport at its own expense such material to the south approach of the Long Bridge or to any other point which it may select within the same distance of the portal of the tunnels. The Contractor agrees to unload said ma-

terial at such point of disposal, furnishing therefor at its own expense, all necessary labor, tools and appurtenances.

X. The Railroad Company further agrees to give to the contractor for use in connection with the execution of this contract free right of occupancy during the continuance of this contract of the property within the shaded boundary lines shown on the attached blue-print, marked Exhibit "C."

In witness whereof, the parties hereto have caused these presents to be executed in duplicate in their corporate names and under
63 their corporate seals, the day and year first hereinbefore written.

W. B. A.

THE NEW YORK CONTINENTAL JEWELL FILTRATION CO.,
By JNO. DOUGHERTY, *President.*

Attest:
JNO. C. SYMONS, *Ass't Treas.*

[Seal of The New York Continental Jewell Filtration Company.]

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD CO.,
By A. J. CASSATT, *President.*

Attest:
LEWIS NEILSON, *Secretary.*

64 And thereupon the defendant rested.

This was all the evidence offered on behalf of either party.

Thereupon the plaintiff prayed the court to instruct the jury as follows:

1. The jury is instructed that the District of Columbia was authorized and entitled to expend from the several sums deposited with said District by the plaintiff, the cost of the relocations and changes of the sewers and water mains in question, which were within the right of way of the Philadelphia, Baltimore & Washington Railway Co., but the said District was not authorized to expend from the said deposits, the cost of such relocations and changes, made outside the said railroad's right of way. It is conceded that the said deposits exceeded the cost of the relocations and changes made within the said railroad's right of way by the sum of $7,172.97. You will therefore render a verdict for the plaintiff for the sum of $7,172.97, together with the interest thereon from the date on which the said relocations and changes were completed.

(Refused, Ex. F. H. A.)

2. The acts of Congress, approved February 12, 1901, and February 28, 1903, defined the obligations imposed upon the Philadelphia, Baltimore & Washington Railroad Company and the District of Columbia, with respect to the relocation of the said railroad's tracks in the city of Washington. Section 9 of the act of 1901, entitled "Division of costs," provided that the cost of making relocations of or changes in sewers and water mains of the city and the

like structures should be borne or defrayed as follows: The cost of such relocations and changes made within the said railroad's right of way should be paid for by the said railroad. The cost of making such relocations or changes outside of the said railroad's right of way should be borne by the United States and the District of Columbia. The agreements of the plaintiff and the District of Columbia with respect to the relocations and changes of the sewer
65 and water mains at the intersection of New Jersey Avenue and D Street, S. E. and the relocation or change of the water main of the city underlying C Street, between New Jersey Avenue and Second Street, S. E., were made in contemplation of the obligations imposed by the statute referred to. That is to say the District of Columbia became entitled to charge against or disburse from the moneys deposited with it by the plaintiff, the cost of the said relocations or changes made within the railroad's right of way and no more, and was obligated to repay to the plaintiff the balance of the moneys deposited by the plaintiff which remained over and above the cost of said relocations and changes made within said railroad's right of way.

(Refused, Ex. F. H. A.)

3. The transactions between the plaintiff and the defendant, which are drawn in question, were had in furtherance of the requirements of the acts of Congress with respect to the relocation and change of the tracks and appurtenances of the Philadelphia, Baltimore & Washington Railroad in the city of Washington. The obligations of the plaintiff and the defendant with respect to changes and relocations of sewers and water mains of the said city are to be measured by the said acts of Congress, except in so far as they may have been modified by the parties in conformity with law. The said acts imposed upon the District of Columbia and the United States the obligation to pay for relocations and changes of sewers and water mains outside the said railroad's right of way. That obligation was not modified by the transactions between the plaintiff and defendant. Representations made by the said Railroad Company to the District of Columbia, with respect to the extent of the plaintiff's obligations in the premises, were not binding upon the plaintiff.

(Refused & Ex., F. H. A.)

4. The jury is instructed that, under its agreements with the District of Columbia, the plaintiff was chargeable with the cost of the relocations and changes of sewers and water mains in ques-
66 tion made within the right of way of the Philadelphia, Baltimore & Washington Railroad Company, which were rendered necessary by the construction of the tunnels of said railroad, but that the cost of such relocations and changes made outside the said right of way, was imposed by law upon the United States and the District of Columbia. The obligation of the plaintiff in this particular was not extended or otherwise affected by any representation or covenant that may have been made to the District of Columbia, by or on behalf of the said railroad with respect to the extent of the work for which the plaintiff was or would be chargeable.

(Refused & Ex. F. H. A.)

Thereupon the court refused to grant each and every one of the plaintiff's said prayers for instructions to the jury, and to the action of the court in so refusing to grant the plaintiff's said prayers, and each one of them, the plaintiff by its counsel noted exceptions, which were allowed.

Thereupon the defendant prayed the court to instruct the jury as follows:

1. The court instructs the jury to return their verdict for the plaintiff for the sum of $1089.79.

Thereupon the court granted the said prayer for an instruction, with the following amendment: Add thereto the following:

"With interest from June 21, 1904,"

So that the prayer, as granted, is as follows:

"The court instructs the jury to return their verdict for the plaintiff for the sum of $1089.79, with interest from June 21, 1904."

To the granting of the said prayer, as amended, the plaintiff, by its counsel, noted an exception, which was allowed; and to the amendment added by the court as aforesaid, the defendant, by its counsel, noted an exception, which was allowed.

67 Be it further remembered that each of the separate and several exceptions taken by the plaintiff to the rulings of the court during the progress of the trial, and the exceptions taken by the plaintiff to the instructions of the court to the jury upon the whole evidence, the substance of which whole evidence is included in this bill of exceptions, as herein set forth, were so taken by counsel for the plaintiff then and there, separately and severally before the jury retired to consider of their verdict, and said exceptions were then and there separately and severally noted on the minutes of the justice presiding at the trial, and counsel for the plaintiff then and there prayed the court to sign and seal this bill of exceptions, to have the same force and effect as if said exceptions were separately and severally set forth in a separate bill of exceptions, and, at the request of counsel for the plaintiff, the same is accordingly signed and sealed and made part of the record in this cause, now for then, this 22d day of July, 1908.

THOS. H. ANDERSON. *Justice.*

Settled by consent,

JAMES H. HAYDEN,
Attorney for Plaintiff.

E. H. THOMAS,
Attorney for Defendant.

68 *Directions to Clerk for Preparation of Transcript of Record.*

Filed July 24, 1908.

In the Supreme Court of the District of Columbia.

Law. No. 49459.

THE NEW YORK CONTINENTAL JEWELL FILTRATION COMPANY,
Plaintiff,
v.
THE DISTRICT OF COLUMBIA.

The plaintiff designates the following portions of the record to be included in the transcript of record on appeal:

1. Declaration, notice to plead and affidavit.
2. Pleas of defendant and affidavit.
3. Joinder in issue.
4. Bill of exceptions with tender thereof.
5. Memorandum of verdict.
6. Judgment.
7. Notation of appeal and filing of bond.
8. Notation of extension of term for settling bill of exceptions and extensions of time for filing transcript of record in Court of Appeals.

JAMES H. HAYDEN,
Attorney for Plaintiff.

Service of the foregoing designation is hereby acknowledged this 23d day of July, 1908.

E. H. THOMAS,
Attorney for Defendant.
Per G.

69 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 68, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 45459 At Law, wherein The New York Continental Jewell Filtration Company is Plaintiff, and The District of Columbia is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix

the seal of said Court at the City of Washington, in said District, this 6th day of August, A. D. 1908.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk.*
By ALF G. BUHRMAN,
Ass't Clerk.

Endorsed on cover: District of Columbia supreme court. No. 1938. The New York Continental Jewell Filtration Co., appellant, *vs.* The District of Columbia. Court of Appeals, District of Columbia. Filed Aug. 6, 1908. Henry W. Hodges, clerk.

No. 1938.

THE NEW YORK CONTINENTAL JEWELL FILTRATION COMPANY, Appellant,
vs.
THE DISTRICT OF COLUMBIA.

TUESDAY, *April 6th, A. D.* 1909.

The argument in the above entitled cause was commenced by Mr. J. H. Hayden, attorney for the appellant.

No. 1938.

THE NEW YORK CONTINENTAL JEWELL FILTRATION COMPANY, Appellant,
vs.
THE DISTRICT OF COLUMBIA.

WEDNESDAY, *April 7th, A. D.* 1909.

The argument in the above entitled cause was continued by Mr. J. H. Hayden, attorney for the appellant, and was concluded by Mr. W. H. White, attorney for the appellee. On motion the appellant is allowed to file a reply brief herein if so advised.

No. 1938.

THE NEW YORK CONTINENTAL JEWELL FILTRATION COMPANY, Appellant,
v.
THE DISTRICT OF COLUMBIA, Appellee.

Opinion.

Mr. Justice VAN ORSDEL delivered the opinion of the Court.

This is a suit in assumpsit brought in the Supreme Court of the District of Columbia by the appellant, plaintiff below, to recover from the District of Columbia the sum of $7,172.97, a balance claimed by plaintiff to be due upon certain deposits made by the plaintiff with the District of Columbia to cover the cost of certain work performed by the District for plaintiff.

The case arises in connection with the relocation of sewers and water mains necessitated by the construction of two tunnels for the Philadelphia, Baltimore and Washington Railroad Company extending from New Jersey avenue and D street southeast to the corner of First and E streets northeast, in the city of Washington. On February 12, 1901, Congress passed an act entitled, "An act to provide for eliminating certain grade crossings on the line of the Baltimore and Potomac Railroad Company, in the city of Washington, District of Columbia, and requiring said company to de-

press and elevate its tracks, and to enable it to relocate parts of its railroad therein, and for other purposes." 31 Stats. L., 767. This act provided for an extensive scheme of public improvement. It described in detail the changes to be made in the grades of streets in connection with the change of the location of the railroad company's tracks and station. Section 9 of the act, making provision in respect to the cost of the work, is as follows:

"SEC. 9. That the entire cost and expenses of the revision, changes, relocations, and improvements of and in said railroad, as authorized and required by the preceding sections of this act, and of all structures connected therewith, or incidental thereto, shall be borne, paid, and defrayed in manner following, to wit: The said Baltimore and Potomac Railroad Company shall bear, pay, and defray all cost and expense of the relocations, elevation, and depression of its tracks within the limits of its right of way as are authorized and required by this act, including the construction of so much of the bridges conveying streets over its tracks, right of way, and other property as shall be within the limits thereof, and the reconstruction within such limits of the streets which shall be carried beneath the same, the cost and expense of removing its tracks from Sixth street north of Virginia avenue, and from K street and Canal street, and the restoration of such parts of said streets for the uses of the public, and the cost and expense of constructing and maintaining the arch or arches for passageways underneath its said tracks located on the Mall, as well as the original cost of paving the roadways and sidewalks to be located within the said passageways. All other costs, expenses, and damages resulting from, incidental to, or connected with the revisions, changes, and improvements in alignment and grades of said railroad, or the relocations thereof by this act required and authorized, and from changes in the grades of the streets or the railroad, and the lawful operation of the said railroad upon the location and structures contemplated and required by this act, and whether to property owners affected thereby or otherwise, as well as the cost and expense of all street approaches to said company's tracks and right of way, whether overhead by means of bridges or under grade, shall be borne, paid, and defrayed in manner following, to wit: Fifty per centum thereof by the United States and the remaining fifty per centum thereof by the District of Columbia, which last mentioned fifty per centum shall be levied and assessed upon the taxable property and privileges in said District other than the property of the United States and of the District of Columbia.

"All work within the limits of the said railroad company's rights of way, including the bridges within said limits, shall be done by said railroad company to the satisfaction and approval of the Commissioners of the District of Columbia, who are authorized to exercise such supervision over the same as may be necessary to secure the proper construction and maintenance of the said work. And all work which is without the limits of the right of way of said railroad company shall be done by the District of Columbia."

On February 28, 1903, Congress passed what is known as the Union Station Act. 32 Stats. L., 909. By the provisions of this act radical changes were made in the improvement contemplated by the act of 1901. Among other things, it required the construction of the tunnels here in question. This act provided, in section 8, as follows:

"The construction of the lines of railroad hereinbefore mentioned, connecting the railroad of said Philadelphia, Baltimore and Washington Railroad Company with said main passenger station and terminal, whether constructed wholly by said Philadelphia, Baltimore and Washington Railroad Company, or said Terminal Company, or partly by each, shall relieve said Philadelphia, Baltimore and Washington Railroad Company of any and all duties and obligations respecting relocation of its present passenger tracks and terminal, and location, construction, and operation of new passenger station and new terminal tracks, as prescribed in the act relating to the Baltimore and Potomac Railroad Company, approved February twelfth, nineteen hundred and one; and upon completion either by said Philadelphia, Baltimore and Washington Railroad Company, or said Terminal Company, or in part by one and in part by the other of said connecting lines of railroad ready for use, in connection with said main passenger station and terminal, as contemplated by this act, and within five years from the passage of this act, the said Philadelphia, Baltimore and Washington Railroad Company shall be, and it is hereby required, to remove its present eastern connection between its passenger station and its line on Virginia avenue via Sixth street, including the tracks on Sixth street, and its western connection via Maryland avenue, and to convey its passenger station building to the United States. And in consideration thereof, and of the relinquishment and surrender by said Philadelphia, Baltimore and Washington Railroad Company, of its right to occupy and use a portion of the Mall, and to maintain thereon a new passenger station and terminals granted to the Baltimore and Potomac Railroad Company by the act aforesaid in consideration of and as a contribution toward the large expenditures to be made by said company in the relocation and improvement of its line of railroad and elimination of grade crossings resulting therefrom, as required by said act, the sum of one million five hundred thousand dollars shall be paid to said Philadelphia, Baltimore and Washington Railroad Company, its successors and assigns, out of any moneys in the Treasury of the United States not otherwise appropriated, and said sum of one million five hundred thousand dollars is hereby expressly appropriated for this purpose, and shall be paid upon presentation of a certificate by the Commissioners of the District of Columbia that said passenger station and terminal and connecting lines of railroad contemplated by this act are ready for occupancy. Except as modified by this act, all provisions of said act relating to the Baltimore and Potomac Railroad Company, approved February twelfth, nineteen hundred and one, and all rights, powers, remedies, and processes thereby conferred on said last-named company, or upon the

Southern Railway Company, shall remain and continue in full force, and with like effect as if herein reenacted at length; and all rights, powers, and privileges granted to, or duties imposed upon, said Philadelphia, Baltimore and Washington Railroad Company by this act shall accrue to and devolve upon its successors and assigns, as provided with respect to the Baltimore and Potomac Railroad Company by section fifteen of said act relating to said Baltimore and Potomac Railroad Company, approved February twelfth, nineteen hundred and one, and all provisions of said section shall be applicable thereto, in all respects, and in like manner as they are made applicable to the rights, privileges, and duties granted to or imposed upon said company by said last mentioned act."

In pursuance of the foregoing acts of Congress, the Philadelphia, Baltimore and Washington Railroad Company, about April 1, 1903, prepared a plat of its proposed line extending from Second street and Virginia avenue southwest, to First street and Massachusetts avenue northeast. This embraced the change necessary to connect its tracks with the new Union Station. The plat, which is in evidence, shows distinctly the course of the tunnels here in question. Shortly thereafter it appears that the plaintiff company opened negotiations with the railroad company, which culminated, in December, 1903, in a contract whereby the plaintiff undertook the construction of the tunnels. Early in July of the same year the plaintiff's engineer took up with the Engineer Commissioner of the District of Columbia the matter of the changes and relocations of sewers and water mains which would be required in consequence of the construction of the tunnels. A proposition was made by the plaintiff that the District perform that portion of the work involved in changing and relocating the sewers and water mains. It appears from the record that plaintiff's engineer and the Engineer Commissioner of the District entered into the matter of the changes and relocations of sewers and water mains with considerable detail; a plat showing the necessary changes was before them and consulted, and the proposition to have the District do this work was practically agreed upon, as evidenced by a letter from Commissioner Biddle to the plaintiff, as follows:

"WASHINGTON, *July* 22, 1903.

"The New York Continental Jewell Filtration Company, New York, N. Y.

"GENTLEMEN: Referring to our oral conversation of July 16, in which you requested that the sewer and water changes necessary on account of the construction of the tunnel of the Pennsylvania R. R. Company, this city, be made by this office, and the plat which you left with me, I would state that the estimated cost of making the changes in the sewers is $7,693.00 and of changes in water mains is $488. Deposit slips for these amounts are herewith and the deposits should be made separately, and upon receipt of the deposits the work will be done by this office. The Water Department made some modifications of the plan suggested by you in the drawings which you left with the object of obtaining better circulation, and the

sewer division increases the size and slope of the proposed new portion of sewer. I return your suggested plan.

"Very respectfully,

"JOHN BIDDLE.
"Major, Corps of Engineers, U. S. A.,
"Engineer Commissioner, D. C.

On July 20th and 21st, respectively, the following estimates of cost of making the necessary changes in the sewers and water mains were furnished by defendant to plaintiff:

"WASHINGTON, *July* 20, 1903.

"The N. Y. Continental Jewell Filtration Co.

"DEAR SIRS: The estimated cost to you for making necessary changes in water mains caused by construction of tunnel N. J. ave. and D street S. E., is $488.00. If you wish the District to do the work, please deposit said amount and this paper with the Collector of Taxes of the District of Columbia.

"Very respectfully yours,

"CHESTER HARDING.
"Captain, Corps of Engineers, U. S. A."

"WASHINGTON, *July* 21, 1903.

"The N. Y. Continental Jewell Filtration Co.

DEAR SIRS: The estimated cost to you for making necessary changes in sewers caused by construction of tunnel N. J. ave. and D. street S. E., is $7,693.00. If you wish the District to do the work, please deposit said amount and this paper with the Collector of Taxes of the District of Columbia.

"Very respectfully yours,

"CHESTER HARDING,
"Captain, Corps of Engineers, U. S. A."

On September 10, 1903, a permit was issued to the railroad company and accepted by it, which prescribed in detail the manner in which the work was to be performed. The permit, among other things, provided:

"All work shall be done in accordance with the plans approved by the Commissioners of the District of Columbia, at the risk and expense of the Philadelphia, Baltimore & Washington Railroad Co. and the responsibility for any and all accidents and damages to persons and property directly or indirectly resulting from, due to, or connected with the construction, maintenance or operation of the work, whether done by the P. B. & W. R. R. Co., or others in connection with it, shall be assumed by the Philadelphia, Baltimore & Washington Railroad Company.

* * * * * * *

"All construction material and public property of whatever nature taken out of the street and not previously paid for by the railroad

company, shall be disposed of as the Engineer Commissioner of the District of Columbia shall direct, and any such material or property, destroyed or unaccounted for, must be paid for or replaced by the Philadelphia, Baltimore & Washington Railroad Company, and no sewer, water or lighting fixtures or appurtenances to the premises of any abutting property shall be disturbed or destroyed until provision has been made by said railroad company for continuing such service, it being the intention hereby that no property shall be deprived of any such privilege now enjoyed.

"Inspectors representing the Commissioners of the District of Columbia and appointed for the purpose, shall have access to the work at all times. They will look after the public interests and convenience and also see that the laws, regulations and ordinances of the United States and District of Columbia are complied with, and it shall be their duty to invite attention to any neglect, oversight or disregard of the terms of this permit, and to insist upon their enforcement."

The issuance of this permit by the District, and its acceptance by the railroad company, was followed on December 10th by the contract between the plaintiff and the railroad company, which, for the consideration therein expressed, required the plaintiff to do all the work involved in the construction of the tunnels in question. This contract, among other things, provided:

"III. The contractor agrees, at its own cost and expense, to take care of and provide all necessary false work, machinery and appliances and labor for sustaining, guarding, removing, changing, or altering all water mains and gas pipes, sewers, passenger railway tracks and railway, telephone, electric light and other conduits, and any other lawful obstruction which it may encounter in doing the work upon the tunnels, and also for supporting and sustaining the streets, avenues, sidewalks, and alleys over said tunnels and all buildings and structures thereon and traffic thereover, and also agrees to obtain from the proper authorities of the Distict of Columbia the necessary permits to make any changes which may be necessary in said streets, avenues, alleys, or sidewalks, or in the location of said water mains and gas pipes, sewers, tracks, and conduits, and after the completion of said tunnels agrees to restore the streets, avenues, sidewalks, and alleys which may be interfered with by the construction of the same to the condition in which they are at present, to the satisfaction of the Commissioners of the District of Columbia, within sixty (60) days after the date when said tunnels shall have been completed. Provided that the contractors shall not be called upon to regrade any streets, avenues, sidewalks, or alleys whose present grade is below the line of the top of the tunnel."

Five days after the signing of the above contract, the plaintiff deposited with the District, as suggested in the estimates of July 20th and 21st, and the letter of July 22d, the sum of $7,693. On the same date $488 were deposited by plaintiff to meet the expense of changing and relocating the water mains. Subsequently, on April 22, 1904, upon a further estimate submitted, $600 more were deposited for the same purpose.

On May 11, 1904, plaintiff called upon the defendant for a statement of the cost of making the changes in the sewers and water mains and for a return of all the unexpended balance of the amount deposited. Defendant replied that the total cost of changing the water mains, as required by the Department, was one thousand ten dollars and eighty-nine cents, leaving a balance of the deposits for that purpose of seventy-seven dollars and eleven cents, and that the total cost of making necessary changes in sewers caused by construction of the tunnel, as required by the Department, was six thousand nine hundred and seventy dollars and thirteen cents, leaving an unexpended balance of the deposit of seven hundred and twenty-two dollars and eighty-seven cents. It is conceded that, of this entire expenditure, only one thousand six hundred and eight dollars and three cents were used in making changes within the right of way of the railroad company. Plaintiff claims the right to recover all of the deposits over and above this amount, while defendant contends that it is entitled to withhold sufficient of the deposits to compensate it for making the changes caused by the construction of the tunnels, both within and without the right of way of the railroad company.

When the evidence was submitted, the court, on request of counsel for defendant, instructed the jury to return a verdict for plaintiff for one thousand eighty-nine dollars and seventy-nine cents, with interest from June 21, 1904. From the judgment entered thereon plaintiff prosecutes this appeal.

Inasmuch as the Philadelphia, Baltimore and Washington Railroad Company was obligated to construct these tunnels under the terms of the foregoing acts of Congress, and the work was to be performed upon plans to be approved by the Commissioners of the District of Columbia (32 Stats. L., 915), it is proper *in* inquire into the nature of the relations existing between the District and the railroad company. That relation was not strictly a contractual one. The railroad company had imposed upon it the duty of making a vast improvement of a public nature, in return for which it was to be paid a large sum of money and extended certain valuable privileges and franchises. The duty of the officers of the District was to see that the work was accomplished as required by law in a manner best suited to subserve the public welfare. Accordingly, after plans had been submitted and approved, on September 10, 1903, a permit was issued to the railroad company by the proper officer of the District authorizing it to proceed with the work and directing the manner in which it should be performed. This permit was brought into the record over the objection of counsel for plaintiff. No error was committed in admitting it. Through it we may ascertain the obligation assumed by the railroad company, the interpretation placed by the company and the District upon the acts of Congress, and their understanding of the obligations imposed upon them. Under the restrictions of the permit, the railroad company undertook the work.

Subsequently, on December 10, 1903, the railroad company entered into a contract with the plaintiff corporation, whereby the plaintiff obligated itself "to furnish all material and provide all labor necessary for, and construct, finish, and deliver within four

hundred (400) working days" the tunnels here in question. By this contract, plaintiff became the agent of the railroad company. It obligated itself to perform the work under the terms of the permit and subject to the supervision of the proper officers of the District. When it made the deposits in question to reimburse the District for doing, at plaintiff's request, a portion of the work which devolved upon it under its contract with the railroad company, it was to reimburse the District for doing work which the company was obligated to perform. This obligation, we think, from a reasonable construction of the terms of the permit, involved all the work and expense of relocating and replacing the water mains and sewers, both within and outside of the right of way, and the contract of plaintiff with the railroad company clearly discloses such an understanding by plaintiff at the time of its execution. This contract was admitted over the objection of counsel for plaintiff, and its admission is assigned as error. The contract was admissible for the purpose of throwing light upon the understanding and intention of the plaintiff at the time of making the deposits and the extent of its agency, as well as an admission by the parties of their understanding of the obligations imposed by the terms of the permit. This was a proper inquiry, since the duty of the railroad company became the duty of plaintiff. It is well settled that "the liability of third persons to an agent upon a contract made with him is to be ascertained by that contract alone, and can not be enlarged by reference to any agreement between the agent and principal by which their mutual rights are to be determined." Mechem on Agency, sec. 759. But this rule can not apply to a case where the person subcontracting with the agent and the person for whom the work is to be done is the same person, for, in that instance, there is direct privity between the principal and subcontractor. But the case at bar is stronger than that. Here, we have found that, strictly speaking, there was no contractual relation between the railroad company and the District. The officers of the District, who, on its behalf, undertook to perform the work in question for the agent of the railroad company, were powerless, under the statute, to enlarge the rights of the plaintiff beyond those conferred by law upon its principal.

We think these transactions are to be construed entirely in the light of the act of Congress of 1903, and not by the act of 1901. Section 9 of the former act, relating to division of costs, had no reference to the construction of the tunnels. It related to an entirely different plan of improvement. It made no reference to the replacing of the water mains and sewers. It contemplated a division of expense between the railroad company named therein and the District of Columbia, while the later act imposed upon the Philadelphia, Baltimore and Washington Railroad Company the obligation of doing the entire work without qualification, and in consideration thereof, provided that it should be paid by the United States one million five hundred thousand dollars. The act of 1903 being clear in its provisions as to the obligations imposed upon the railroad company and the corresponding duty imposed upon the Dis-

trict, the provisions of section 9 of the act of 1901 can not be read into it without doing violence to the express terms and intent of the later act.

A false impression seems to exist in the mind of counsel for plaintiff as to the effect upon plaintiff of the acts of the railroad company between the inception and conclusion of the arrangements between plaintiff and defendant. Counsel insists that, since the permit was issued to the railroad company after the offer was made to have the District do the work, any change or modification of the situation occasioned by the terms of the permit, or otherwise, without notice to plaintiff, was a matter between the railroad company and the District, and any obligation imposed by such change upon the railroad company would not be chargeable to plaintiff. We do not attach importance to this contention, for the reason that the status of the parties before us did not become fixed until the negotiations were completed by the plaintiff's making the deposits. The contract had then been executed and the District had the right to rely upon the plaintiff, as the agent of the railroad company, to carry out the requirements of the permit. If the railroad company concealed from plaintiff obligations thus assumed, and plaintiff was damaged thereby, it may well be that it had a cause of action against the company. But with that we are not concerned.

It is insisted by the plaintiff that there is no proof that it had notice of the terms of the permit when it contracted with the railroad company. We can arrive at no other conclusion than that the permit was fully considered when the contract was made. Especially will such a presumption be indulged when the contract, upon its face, strongly supports such a conclusion. The burden of proof was upon the plaintiff, and the record is silent as to any lack of notice by plaintiff of the terms of the permit before making the deposits. Hence, it is not in position to claim such a presumption in its favor. Indeed, it would be difficult to conceive of any misunderstanding, in view of the conversations of plaintiff's engineer with the Engineer Commissioner of the District when this work was fully considered, with a plat before them showing in detail the entire work to be accomplished, the correspondence between them, the estimates furnished, the correspondence relating to the deposits, and the issuance of the permit, all of which occurred long prior to the making of the contract. This conclusion is emphasized by the promptness with which the plaintiff, without further correspondence or conversation, made the deposits after the contract was signed.

The position of the plaintiff as here presented is wholly inconsistent. It is not in a position to assert rights under the statute. Its relation throughout is a contractual one intermediate between the original parties, whose respective duties were established by the acts of Congress. Even assuming that the railroad company and the District made a mistake in construing the terms of the statute as to the relocating and replacing of the water mains and sewers, plaintiff is not in position to here demand its correction. It assumed the obligation of the railroad company as the company understood it, and with which, so far as the record discloses, the company is con-

tent. The railroad company contracted to pay plaintiff for doing the work on that basis. Hence, if the company and the District made a mistake in interpreting their respective obligations, the plaintiff has not been injured and can not avail itself of that mistake.

The case, therefore, resolves itself to this, that the work here performed for the plaintiff by the District was work imposed by the act of Congress upon the railroad company and, in turn, by express contract upon the plaintiff. Plaintiff has done nothing more than it was required to do under its contract with its principal. If, after it had contracted to do the work, it found that it had been deceived by the railroad company, that is a matter with which the defendant is not concerned. In any view of the case, plaintiff has no right of recovery; hence no error was committed in instructing a verdict for defendant.

The judgment is affirmed with costs, and it is so ordered.

Affirmed.

April Term, 1909.

No. 1938.

THE NEW YORK CONTINENTAL JEWELL FILTRATION COMPANY, Appellant,
vs.
THE DISTRICT OF COLUMBIA.

MONDAY, *May 17th, A. D.* 1909.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause, be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE VAN ORSDEL,
May 17, 1909.

No. 1938.

THE NEW YORK CONTINENTAL JEWELL FILTRATION COMPANY, Appellant,
vs.
THE DISTRICT OF COLUMBIA.

TUESDAY, *June 1st, A. D.* 1909.

On motion of Mr. G. W. Dalzell, on behalf of counsel for the appellant, It is ordered by the Court that a writ of error to remove this cause to the Supreme Court of the United States issue, and the bond for costs is fixed at the sum of three hundred dollars.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between The New York Continental Jewell Filtration Company, Appellant, and The District of Columbia, Appellee, a manifest error hath happened, to the great damage of the said Appellant as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 1st day of June, in the year of our Lord one thousand nine hundred and nine.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by—
——— ———.

(*Bond on Writ of Error.*)

Know all men by these presents, That we, The New York Continental Jewell Filtration Company, a corporation organized and existing under the laws of the State of New Jersey, as principal, and Fidelity and Deposit Company of Maryland, of No. 2 Rector Street, in the Borough of Manhattan, City of New York, as surety, are held and firmly bound unto the District of Columbia in the full and just sum of three hundred dollars ($300) to be paid to the said District of Columbia, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this first day of June, in the year of our Lord one thousand nine hundred and nine.

Whereas lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between the said The New York Continental Jewell Filtration Company, as appellant, and the District of Columbia, as appellee, numbered Docket No. 1938, a judgment was rendered against the said The New York Continental Jewell Filtra-

tion Company, and the said The New York Continental Jewell Filtration Company having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said District of Columbia, citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said The New York Continental Jewell Filtration Company shall prosecute said writ of error to effect, and answer all costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

[Seal of New York Continental Jewell Filtration Company.]

THE NEW YORK CONTINENTAL JEWELL FILTRATION COMPANY, [SEAL.]
By WM. B. ANDERSON, *Vice-President.* [SEAL.]

[Seal of Fidelity & Deposit Company of Maryland.]

FIDELITY AND DEPOSIT COMPANY OF MARYLAND. [SEAL.]
HENRY B. PLATT, *Vice-President.* [SEAL.]
JAMES R. KINGSLEY, *Attorney.* [SEAL.]

Sealed and delivered in the presence of—

WM. McM. NORTH,
Ass't Sec'y.

Approved by—

SETH SHEPARD,
Chief Justice Court of Appeals of the District of Columbia.

[Endorsed:] 1938. The New York Continental Jewell Filtration Company, Appellant, vs. The District of Columbia. Bond for Costs on Writ of Error to Supreme Court U. S. Court of Appeals, District of Columbia. Filed June 1, 1909. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, *ss:*

To the District of Columbia, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein The New York Continental Jewell Filtration Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of

Appeals of the District of Columbia, this 1st day of June, in the year of our Lord one thousand nine hundred and nine.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted this 1st day of June, A. D. 1909.
E. H. THOMAS.
F. H. S.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jun 1, 1909. Henry W. Hodges, Clerk.

No. 1938.

THE NEW YORK CONTINENTAL JEWELL FILTRATION COMPANY, Appellant,
vs.
THE DISTRICT OF COLUMBIA.

FRIDAY, *June 4th, A. D.* 1909.

On motion of Mr. G. W. Dalzell, on behalf of counsel for the appellant in the above entitled cause, It is ordered by the Court that the bond to act as supersedeas on writ of error to the Supreme Court of the United States in said cause, be, and the same is hereby fixed at the sum of one thousand dollars.

(*Bond on Writ of Error.*)

Know all men by these presents, That we, The New York Continental Jewell Filtration Co., a corporation organized and existing under the laws of the State of New Jersey, as principal, and Fidelity & Deposit Company of Maryland, as surety, are held and firmly bound unto the District of Columbia in the full and just sum of One thousand ($1,000.00) Dollars, to be paid to the said District of Columbia, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this fourth day of June, in the year of our Lord one thousand nine hundred and nine.

Whereas, lately a Court of Appeals of the District of Columbia, in a suit depending in said Court, between the said The New York Continental Jewell Filtration Company, as appellant, and the said District of Columbia, as appellee, a judgment was rendered against the said The New York Continental Jewell Filtration Company and the said The New York Continental Jewell Filtration Company having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said District of Columbia

citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said The New York Continental Jewell Filtration Company shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

[Seal of the New York Continental Jewell Filtration Company.]

THE NEW YORK CONTINENTAL JEWELL FILTRATION CO. [SEAL.]
WILLIAM B. ANDERSON, [SEAL.]
Vice Prest.
FIDELITY AND DEPOSIT COMPANY OF MARYLAND. [SEAL.]
By H. B. HODGE,
Attorney in Fact.

[Seal of Fidelity and Deposit Company of Maryland.]

Sealed and delivered in the presence of—

WM. McM. NORTH,
Ass't Sec'y.

O. K.

E. H. T.

Approved by—

SETH SHEPARD,
Chief Justice Court of Appeals of the District of Columbia.

[Endorsed:] No. 1938. The New York Continental Jewell Filtration Co., Appellant, vs. The District of Columbia. Supersedeas Bond on Writ of Error to Supreme Court U. S. Court of Appeals, District of Columbia. Filed June 5, 1909. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 60 inclusive contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of The New York Continental Jewell Filtration Company, Appellant, vs. The District of Columbia. No. 1938, April Term, 1909, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix

the seal of said Court of Appeals, at the City of Washington, this 9th day of June, A. D. 1909.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Supreme Court of the United States.

No. 145, October Term, 1911.

THE NEW YORK CONTINENTAL JEWELL FILTRATION COMPANY, Plaintiff in Error,
v.
THE DISTRICT OF COLUMBIA, Defendant in Error.

Assignment of Errors.

The plaintiff in error assigns the following errors, committed by the Court of Appeals of the District of Columbia in its opinion and judgment herein:

I. The said court erred in failing and refusing to hold that the agreements and transactions of the plaintiff and defendant, drawn in question, were entered into in furtherance of the acts of Congress relating to the change and relocation of the tracks and appurtenances of the Philadelphia, Baltimore & Washington Railroad Company, entitled "An act to provide for eliminating grade crossings on the line of the Baltimore & Potomac Railroad Company, in the city of Washington, District of Columbia, and requiring said company to depress and elevate its tracks, and to enable it to relocate parts of its railroad therein, and for other purposes," approved February 12, 1901, and "An Act to provide for a union railroad station in the District of Columbia and for other purposes," approved February 28, 1903, and that, in case of ambiguity with respect to the work forming the subject matter of the said agreements and transactions, resort may be had to the said acts of Congress to show the extent of the said work, as contemplated by the parties.

II. The said court erred in holding that the transactions of the parties with respect to the relocations and changes of sewers and watermains incident to the construction of the tunnels, required by the act of Congress entitled "An Act to provide for a union railroad station in the District of Columbia and for other purposes," approved February 28, 1903, were in no way governed or affected by the act of Congress entitled "An Act to provide for eliminating grade crossings on the line of the Baltimore & Potomac Railroad Company, in the city of Washington, District of Columbia, and requiring said company to depress and elevate its tracks, and to enable it to relocate parts of its railroad therein, and for other purposes," approved February 12, 1901.

III. The said court erred in holding that the transactions of

the plaintiff and defendant, drawn in question, were or could have been modified or affected by the permit issued by the defendant to the Philadelphia, Baltimore & Washington Railroad Company on September 10, 1903, or the contract entered into between the plaintiff and the said railroad company on December 10, 1903.

IV. The said court erred in holding that the permit issued by the District of Columbia to the Philadelphia, Baltimore & Washington Railroad Company on September 10, 1903, and the contract entered into by the plaintiff and the said railroad company on December 10, 1903, were admissible as evidence tending to show the subject matter of the agreements and transactions of the plaintiff and defendant, drawn in question in this cause.

V. The said court erred in failing and refusing to hold that the District of Columbia was authorized to expend from, or charge against, the moneys deposited with it by the plaintiff, the cost of work done upon relocations and changes of sewers and watermains within the right of way of the Philadelphia, Baltimore & Washington Railroad Company, and no more, and that the plaintiff was entitled to recover from the defendant herein the balance of its said deposits which remained after the deduction of the cost of said work done within the railroad company's right of way.

VI. The said court erred in holding that the trial court committed no error in instructing the jury to return a verdict for the plaintiff for the sum of $1,089.79, with interest, which said sum represented the balance of the moneys deposited by the plaintiff with the defendant, remaining after the defendant had expended and deducted from the said deposits the cost of relocations and changes of the sewers and watermains, made both within the right of way of the Philadelphia, Baltimore & Washington Railroad Company and outside the limits thereof.

JAMES H. HAYDEN,
Of Counsel for Plaintiff in Error.

Service of a copy of the foregoing assignments of error is hereby acknowledged, this 3rd day of August, 1911.

E. H. THOMAS,
Of Counsel for Defendant in Error.

[Endorsed:] No. 145, Oct. Term, 1911. The N. Y. Continental Jewell Filtration Co., v. The District of Columbia, Assignment of Errors. James H. Hayden, Of Counsel for Plaintiff in Error.

[Endorsed:] File No. 21,859. Supreme Court U. S., Octo-Term, 1911. Term No. 145. The New York Continental Jewell Filtration Co., Pl'ff in Error, vs. The District of Columbia. Assignment of Errors & proof of service of copy of same. Filed August 4th, 1911.

Endorsed on cover: File No. 21,859. District of Columbia Court of Appeals. Term No. 145. The New York Continental Jewell Filtration Company, plaintiff in error, vs. The District of Columbia. Filed October 11th, 1909. (21,859.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 145

THE NEW YORK CONTINENTAL JEWELL FILTRATION COMPANY, PLAINTIFF IN ERROR,

v.

THE DISTRICT OF COLUMBIA.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is an action of assumpsit, which was brought in the Supreme Court of the District of Columbia by the Filtration Company, plaintiff in error, to recover the sum of $7,172.97, claimed by it as the amount of unexpended balances, of three deposits amounting to $8,781.00, which the company made with the District of Columbia, to cover the cost of work, which the District undertook to do for the

company. The condition upon which the deposits were made was that the District should expend such of the company's money as might be needed to defray the cost of the work, and upon the completion of the work should return the unexpended balances to the company (pp. 20-24). The matter in dispute is the extent of the work thus undertaken by the District for the Filtration Company, and for which it became entitled to expend the money deposited. The company contends that the work for which the District was authorized to expend its money, cost the District $1,608.03, and that of the sums deposited by it, there remained unexpended balances to the amount of $7,172.97. The District, on the other hand, contends that it was entitled to charge the company for that work, and also for other work which was done by it, at a total cost of $7,691.21, leaving $1,089.79 as the amount of unexpended balances, returnable to the company (pp. 27-28). There is no controversy with respect to the facts. This dispute turns upon the legal effect of the transactions of the parties. At the trial, the court decided this question adversely to the plaintiff's contention and instructed the jury to return a verdict for the plaintiff for the sum of $1,089.79 with interest, to which instruction the plaintiff excepted (pp. 34, 45). The jury returned a verdict as directed (p. 9), judgment was entered thereon, and the company appealed (p. 10). After hearing, the Court of Appeals affirmed the judgment (p. 51), and the company sued out this writ of error (pp. 57-62).

To determine whether the company were chargeable with the cost of work, which it concedes to have been covered by its bargain with the District, alone; or were chargeable with the cost of all of the work for which the District seeks to charge it; it will be necessary to review the trans-

actions of the parties which culminated in the making of the deposits and the performance of the work by the District. It will be necessary, also, to review the acts of Congress under the authority of which the work was done.

The work consisted of the relocation of a sewer and water mains at and in the vicinity of the intersection of New Jersey Avenue and D Streets, southeast, in the city of Washington. These relocations were necessitated by the relocation of railroad tracks and other work incident to the establishment of the railroad terminal which was constructed during the years 1903 to 1905, pursuant to the requirement and authority of the so-called union station act, approved February 28, 1903,[1] and an earlier act relating to the same general purpose, approved February 12, 1901.[2] The two acts taken together described in detail the line along which the Philadelphia, Baltimore & Washington Railroad Company was required to relocate and construct its tracks and terminal and prescribed the grade of its relocated tracks, at various points. The description of the part of this line, with which we are concerned, is contained in Section 1 of the act of 1903 and reads:

> *"Thence passing under the intersection of D Street with New Jersey Avenue, C Street southeast,* and B Street southeast at the intersection with First Street; thence continuing under the west side of First Street to near E Street northeast."

Provision for the removal and reconstruction of sewers, water-mains, and the like public works of the city when

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[1] *"An act, To provide a union railroad station in the District of Columbia and for other purposes."* (32 Stat. L., 909.)

[2] *"An act, To provide for eliminating certain grade crossings on the line of the Baltimore & Potomac Railroad Company in the City of Washington, District of Columbia, and requiring said company to depress and elevate its tracks and to enable it to relocate parts of its railroad therein, and for other purposes."* (31 Stat. L., 767.)

found to interfere with the relocation of the railroad line, as required by Congress, was made by Section 9 of the act of February 12, 1901, entitled "Division of Costs." This reads:

> "Sec. 9. That the entire cost and expense of the revision, changes, relocations, and improvements of and in said railroad, as authorized and required by the preceding sections of this act, *and of all structures connected therewith or incidental thereto* shall be borne, paid and defrayed in manner following, to wit: The said Baltimore and Potomac Railroad Company shall bear, pay and defray all cost and expense of relocations, elevation, and depression of its tracks, *within the limits of its right of way as are authorized and required by this act. * * * All other costs, expenses, and damages resulting from, incidental to, or connected with the revisions, changes, and improvements in alignment and grades of said railroad, or the relocations thereof by this act required and authorized,* and from *changes in grades of* the streets *or the railroad * * * shall be borne, paid and defrayed in manner following, to wit, Fifty per centum thereof by the United States and the remaining fifty per centum by the District of Columbia. * * * All work within the limits of said railroad company's right of way * * * shall be done by said railroad company* to the satisfaction of the Commissioners of the District of Columbia, who are authorized to exercise such supervision over the same as may be necessary to secure the proper construction and maintenance of the said work. *And all work which is without the limits of the right of way shall be done by the District of Columbia."*

Neither act contains any other provision, with respect to the relocation of the permanent sewers and watermains of the city, when found to interfere with the relocation

of the railroad tracks. There is no provision whatever in the Act of February 28, 1903, with respect to the performance of or payment for such work.

In a physical sense, the plan for the railroad terminal, contemplated by the act of 1901, was modified by the act of 1903. Some change was made, also, in the conditions prescribed for the performance of work. But the provisions relating to the division of work between the railroad company and the District and the division of its cost between the railroad and the government, federal and municipal, contained in Section 9 of the act of 1901, remained unchanged. By section 8 of the union station act (1903) it was provided:

> *Except as modified by this act, all provisions of said act relating to the Baltimore and Potomac Railroad Company, approved February twelfth, nineteen hundred and one and all rights, powers, remedies, and processes thereby conferred on said last named company, or upon the Southern Railway Company, shall remain and continue in full force and with like effect as if herein re-enacted at length."*

In both acts mention is made of the *"right of way"* to be allotted to the railroad for use in the relocation of its tracks and appurtenances, in conformity with the requirements of the statutes (*Act, February 12, 1901, Secs. 1 and 9; Act, February 28, 1903, Secs. 1, 5 and 10*). In each act it was provided that before any work should be begun, plans thereof made in conformity with the acts of Congress, should be prepared by the railroad and approved by the Commissioners of the District of Columbia (*Act 1901, Sec. 13; Act 1903, Sec. 7*). In obedience to that requirement, the Philadelphia, Baltimore & Washington Railroad Company prepared plans of the work. These were submitted to

the Commissioners and approved by them on April 1, 1903 (p. 13). From the plans, as well as from section 1 of the union station act (*supra*), it appears that, from the intersection of D Street and New Jersey Avenue, to a point about the intersection of First and E streets, northeast, the tracks were required to be located below grade and pass through a tunnel. Throughout the course of the tunnel, the "right of way" allotted to the railroad was fifty feet in width (p. 13).

Portions of the sewer and of the water-mains in question, were found to be in the path of this tunnel as projected. In the early part of July, 1903, the Filtration company was selected by the railroad company to build the tunnel for it and that fact was made known to the Commissioners of the District of Columbia. While the Filtration Company had been chosen to do that work, it was still in negotiation with the railroad concerning the terms of the contract under which that work was to be done (pp. 31-33). The railroad company was still in negotiation with the District with reference to the terms of the permit which was to govern the conduct of work upon the tunnel, and that of other work to be done by the railroad company in the relocation of its line.

Before work upon the tunnel could be begun, it was necessary to remove the portions of the sewer and water-mains which lay in its path, *i. e.*, within the railroad company's right of way. The Filtration Company took up the matter of these removals with the Commissioners about the middle of July, 1903. In the case of the sewer, the Commissioners determined that the relocation could be accomplished, best by lowering the section which lay within the "right of way," so that it would pass under the roadbed and the foundations of the tunnel. To prevent abrupt changes in the course of the sewer, they decided to re-

move, also, considerable sections on either side of the "right of way" and replace them with new sections having gradual slopes to connect the sewer proper with the new section running beneath the roadbed. In the case of the watermains, the Commissioners determined to remove the portions which lay within the right of way and to relocate them for the most part, but not wholly, outside the right of way (pp. 13-16).

Under the provisions of Section 9 of the act of February 12, 1901, the work of removing the section of sewer and portions of the watermains lying within the limits of the railroad's right of way devolved upon the railroad as did the work of constructing the new section of sewer, running beneath its tracks, and the new portions of the watermains which were to remain located *within* the right of way. But the removal and relocation of the sections of sewer and the portions of the watermains which lay *without* the limits of the railroad's right of way, devolved upon the District of Columbia and its cost was made a charge upon the United States and the District of Columbia, jointly.

According to an understanding reached by the Filtration Company and the Commissioners, the District undertook to make the relocations, both within and without the right of way. The company, at the District's request, deposited moneys to cover the estimated cost of work to be done for it by the District. It was not stated, in terms, whether the work thus provided for was to consist of that done within the right of way alone, or whether it was to embrace all work done upon the relocations both within and without the limits of the right of way. On July 22, 1903, the Engineer Commissioner wrote to the company (pp. 15-18), saying that the estimated cost of work on sewers was $7,693, and the estimated cost of work, on watermains

was $438. He said that the District would do the work for the company upon its depositing the estimated cost thereof (pp. 15-16). He did not say whether the work which the District thus undertook to do for the company was work to be done within the right of way alone, or whether he meant to include all work involved in making the changes, whether within the right of way or outside of it. With his letter he enclosed what he termed deposit slips which were made out on the forms regularly used by the District Government in cases it undertakes to perform work on sidewalks of the city. These gave estimates of the cost of the work; and the District offered to do the work for the company provided it would deposit the estimated cost of work "to you (the company)." They contained also agreements to notify the company when the work should be completed and then return to the company the balances of deposits made by it, which might remain, unexpended (pp. 16-18). On December 15, 1903, the Filtration Company made the deposits, as requested (pp. 20-22). On January 18, 1904, the Commissioners ordered a further "change" in the location of watermains, which were found to lie within the projected path of the tunnel. As in the former instance, the District offered to perform work on their relocation, for the company, upon its making a deposit. The deposit was made on April 22, 1904 (pp. 21-23). The correspondence with reference to this deposit did not state explicitly whether the company's money was to be used for work done within the right of way, alone, or whether the District would use it, for work done outside the right of way, as well.

On May 11, 1904, after the relocation of the sewer and the watermains had been completed, the District having omitted to notify the company of that fact, the company wrote to the Commissioners, reminding them of

the deposits which it had made, and asked for a statement of the cost of the work done for it and that the unexpended balances be returned to it (p. 23). The Commissioners failed to comply with this request and the company's letter of May 11 remained unanswered on June 1, when it wrote to the Commissioners again, calling attention to its letter of May 11. Its request for a statement of the cost of work done upon the several changes of sewers and watermains "*within the right of way* of the First Street tunnel at N. J. Avenue and D St., S. E., and C St., S. E., between N. J. Avenue and First Street" and for the return of the unexpended balances of the deposits was repeated (p 24). On June 20 and June 21, the Auditor for the District of Columbia sent the company vouchers tendering payments, as follows (pp. 24-26):

Deposit	Amount	Deduction by the District of Columbia	Payment tendered to company as unexpended balance.
No. 788 (sewer)	$7,693.00	$6,670.13	$722.87
787 (watermain)	488.00	1,010.89	77.11
1340 (watermain)	600.00		
Total	$8,781.00	$7,981.02	$799.98

The vouchers were not accompanied by any statement of the disbursements which the District had made or was attempting to charge against the company's deposits.

On June 23, the company returned the vouchers to the Engineer Commissioner with the request that he furnish a detailed statement of the cost of the work (p. 25).

On July 12, the Auditor for the District sent the company a statement from which it appeared, for the first time, that the District was attempting to charge the company with

the cost of work done upon the relocation of the sewer and watermains *without* the right of way, as well as that done *within* its limits (pp. 26-27).

On November 2, the company, through its attorney wrote to the Commissioners, protesting against the deductions made for work done outside the right of way and asking for a revision of the account and a settlement in which the company would be charged for work done *within* the right of way, alone (pp. 27-28). This request was refused and no money has been returned to the company (p. 28).

At the trial counsel for both parties stipulated as follows (pp. 27-28): (*1.*) The work in question was necessitated by the construction of tunnels for the Philadelphia, Baltimore & Washington Railroad Company, required and authorized by the act of Congress approved February 12, 1901 (*supra*), and the act of February 28, 1903 (*supra*). (*2.*) The company made deposits with the District to the amount of $8,781. (*3.*) The District expended for the work done upon the sewer and watermains *within* the right of way, $1,608.03. Hence, if the Filtration Company were chargeable for that work alone, it would be entitled to the return of unexpended balances to the amount of $7,172.97. The cost of work done by the District both within and without the limits of the right of way amounted to $7,691.21, and if the company were chargeable with the cost of work done outside the right of way as well as that done within it, the unexpended balances returnable to it would amount to $1,089.79.

On these facts the company contended that its understanding was that the District was authorized to use its money for no purpose except to defray the cost of work done within the right of way, was based upon the law, and situation of the parties existing at the time of its nego-

tiations with the District and when the deposits were made, and when the District was performing the work (p. 30). The law (*Section 9, Act of February 12, 1901, entitled "Division of Costs"*) controlled the performance of work, such as the relocation of the sewer and watermains in question. It provided that:

> *"All work which is without the right of way of the said railroad company shall be done by the District of Columbia."*

It provided also:

> "The said Baltimore and Potomac Railroad Company shall bear, pay, and defray *all cost and expense of the relocations,* elevation and depression *of its tracks within the limits of its right of way,* as are authorized and required by this act. * * * *All other costs, expenses, and damages, resulting from, incidental to, or connected with the revisions, changes, and improvements in alignment and grades of said railroad or the relocations thereof by this act required and authorized* * * * and whether to property owners affected thereby *or otherwise* * * * *shall be borne, paid and defrayed in manner following, to wit, Fifty per centum thereof by the United States and the remaining fifty per centum thereof by the District of Columbia."

It was required, too, that such work, within the limits of the right of way:

> "should be done by said railroad company to the satisfaction and approval of the Commissioners of the District of Columbia, who are authorized to exercise such supervision over the same as may be necessary to assure the proper construction and maintenance of said work."

Accordingly, when it had been decided that the Filtration Company was to build the tunnels for the railroad and the Commissioners had decided what relocations of sewers and watermains would be necessary in consequence of the construction of the tunnels, the company approached the Commissioners with the purpose of making an arrangement under which the District, which was required by the statute to perform the part of the work *outside* the right of way, should perform, also, but at the company's cost, the part of the work which was to be done *within* the right of way. When the Engineer Commissioner wrote to it on July 22, 1903, offering to make the relocations, provided that the company would make certain deposits, and said nothing to indicate that he contemplated an arrangement with respect to the cost of the work, different from that prescribed by the statute, the company assumed that its money would be spent for the part of the work which the law imposed upon the railroad company alone, *i. e.*, work *within* the right of way. That view of the matter was confirmed by the deposit slips, which the Engineer Commissioner enclosed with his letter. These began with notices to this effect:

> "The estimated cost *to you* for making the necessary changes in sewers caused by construction of tunnel, N. J. Ave. and D Street S. E. is $7,693.00. *If you wish the District to do the work*, please deposit said amount and this paper with the Collector of Taxes of the District of Columbia."

Under the circumstances, the occurrence of the words "*to you*" in this notice: "estimated cost *to you* of making the necessary changes," would have been sufficient to cause the Filtration Company to believe that the District understood that the "necessary changes" would involve costs to

be defrayed by the government, or at any rate some party other than the company.

The notice was not understood to apply to work which was to be done *without* the limits of the right of way, for the further reason that the District being required, by law, to perform that work, was bound to do it whether the Filtration Company wished it or not, and whether it made a deposit to cover the cost of the work or not. As stated above, the District gave the company no intimation that it had different views on the subject, or would attempt to charge the company for work done outside the limits of the right of way, until several months after the work had been completed and the company had, three times, demanded a statement of the cost and finally rejected payments tendered to it by the District without a statement (pp. 23-25).

To maintain its contention, the District offered in evidence the permit issued to the railroad company by the Commissioners on September 10, 1903 (pp. 34-38) and the contract between the Filtration Company and the railroad company, by which the former undertook to construct the tunnels on December 10, 1903 (pp. 38-43). They were admitted over the plaintiff's objection that they were irrelevant and immaterial. Neither document represented a transaction to which one or the other of the parties to this cause was not a stranger, and both documents came into existence long after the negotiations between the Filtration Company and the District, with respect to the relocations in question. Hence neither of them was evidence competent to prove what was the subject matter of the bargain between the Filtration Company and the District with respect to the relocation of sewers and watermains (pp. 33-34).

The permit was intended to govern the *conduct* of work done by or on behalf of the railroad company, in the reloca-

tion of the railroad's line and other things incident to the use of the line, all required of it by the acts of February 12, 1901, and February 28, 1903 (*supra*). The portions of the permit on which the District relies read:

> "All work shall be done in accordance with the plans approved by the Commissioners of the District of Columbia, at the risk and expense of the Philadelphia, Baltimore & Washington Railroad Co. and the responsibility for any and all accidents and damages to persons and property directly or indirectly resulting from, due to, or connected with the construction, maintenance or operation of the work, whether done by the P. B. & W. R. R. Co., or others in connection with it, shall be assumed by the Philadelphia, Baltimore & Washington Railroad Company."
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> * * * * * * * * * * *
>
> "All work shall be so arranged and conducted as to inconvenience the public as little as possible and suitable and efficient means must be employed to maintain and protect travel on all intersecting and adjacent streets and highways, by providing such roadways, bridges, fences, barricades, lights and watchmen as may be necessary in the opinion of the Commissioners of the District of Columbia to afford the least inconvenience and danger to persons and property and the Police Regulations governing the storage, lighting and protection of materials in the public space shall be fully observed, as will also the application of these regulations to the general conduct of the work."
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> * * * * * * * * * * * *
>
> "All construction material and public property of whatever nature taken out of the street and not previously paid for by the railroad company, shall be disposed of as the Engineer Commissioner of the District of Columbia shall direct, and any such material or property, destroyed or unaccounted for, must be paid for or replaced by the Philadelphia, Baltimore & Washington Railroad Company, and no sewer, water or

lighting fixtures or appurtenances to the premises of any abutting property shall be disturbed or destroyed, until provision has been made by said railroad company for continuing such service, it being the intention hereby that no property shall be deprived of any such privilege now enjoyed."

* * * * * * * * * * * * *

"The Philadelphia, Baltimore & Washington Railroad Company shall deposit with the Collector of Taxes of the District of Columbia the sum of three thousand dollars ($3,000) and such further sums from time to time as may in the opinion of the Commissioners of the District of Columbia be necessary to defray such expenses as may be incurred by the District of Columbia in making good all damages to any District work injured and in restoring all pavements disturbed by changes made in connection with said work; provided, that when the work is completed, such amount as shall not have been expended shall be returned to said company within ninety days, with a complete itemized statement of all expenditures made in full. Restoration of and repairs to pavements, etc., and all other municipal property will be done by the District of Columbia or its agents and the cost of the same will be charged to this deposit."

It will be observed that this permit did not pretend to modify, if indeed it could have modified, the scheme of public improvement required by Congress. It was issued under the authority and in furtherance of the acts of 1901 and 1903 and did not and could not increase or decrease the rights or the obligations which Congress had imposed upon the railroad on the one hand, or upon the District on the other. The purpose of the permit was that contemplated by Congress, and nothing else, *i. e.*, to regulate the manner in which work should be done upon the relocations by Congress and the conduct of other work incident to the establishment of the railroad terminal in such

a way that the safety, health and convenience of the public should be insured as far as possible, while the work should be in progress. (*Act February 12, 1901, Sec. 13; Act February 28, 1903, Sec. 7.*) For instance: Section 7 of the Act of February 12, 1901, after directing that certain of the streets of Washington should be vacated in order to permit the relocation of the tracks, required by the act, provided:

> "That nothing herein contained shall be construed to prohibit the public authorities from entering upon vacated and abandoned streets and avenues for the purpose of locating, constructing, maintaining or repairing sewers, watermains, gas mains, conduits, and other underground construction necessary for the public comfort, convenience, or health. *And provided further,* That no portion of any street shall be closed under authority of this act until said railroad company shall have secured control of the property abutting upon said portion to be closed, it being the intent hereof that no property owner shall be deprived of egress from or ingress to his property."

Hence the provision of the permit (*supra*):

> "No sewer, water or lighting fixtures or appurtenances to the premises of any abutting property shall be disturbed or destroyed until provision has been made by said railroad for continuing such service, it being the intention hereby that no property shall be deprived of any such service now enjoyed."

The permit related to the conduct of the work done. The Commissioners were authorized to regulate that and nothing else. The permit did not pretend to grant or confirm rights which Congress had given the railroad, nor shift to the railroad obligations which Congress had imposed upon

the District. It could not have done any of these things.

The contract between the Filtration Company and the railroad company (pp. 38-43) related to the construction of the tunnels above mentioned. The language employed by the parties, as well as the conditions existing when the contract was made, show that it was their intent that the Filtration Company should construct the tunnels for the railroad in the manner required by Congress and the plans approved by the Commissioners. Also that the Filtration Company should perform such other work incident to the construction of the tunnels as Congress had imposed upon the railroad, and no more; and that in the conduct of the work, the Filtration Company should observe the requirements of the permit issued by the Commissioners. The paragraph of this contract upon which the defendant relied reads:

> "III. The contractor agrees, at its own cost and expense, to take care of and provide all necessary false work, machinery and appliances and labor for sustaining, guarding, removing, changing or altering all water-mains and gas pipes, sewers, passenger railway tracks and railway, telephone, electric light and other conduits; and *any other lawful obstruction which it may encounter in doing the work upon the tunnels*, and also for supporting and sustaining the streets, avenues, sidewalks and alleys over said tunnels and all buildings and structures thereon and traffic thereover, and also agrees to obtain from the proper authorities of the District of Columbia the necessary permits to make any changes which may be necessary in said streets, avenues, alleys or sidewalks, or in the location of said water-mains and gas pipes, sewers, tracks and conduits, and after the completion of said tunnels agrees to restore the streets, avenues, sidewalks and alleys which may be interfered with by the construction of the same to the condition in

> which they are at present, to the satisfaction of the Commissioners of the District of Columbia, within sixty (60) days after the date when said tunnels shall have been completed. Provided that the contractor shall not be called upon to regrade any streets, avenues, sidewalks or alleys, whose present grade is below the line of the top of the tunnels."

This related chiefly to the preservation of streets and similar structures mentioned from damage which might come to them in consequence of the construction of the tunnel, while work upon it should be in progress, it provided also that the company should furnish and maintain such temporary structures as might be needed to insure the safety or convenience of the public, during the building period. It did not in terms require the Filtration Company to *reconstruct* the watermains, sewers, and the like structures, *"which it might encounter in doing the work upon the tunnels,"* to pay for any work involved in their reconstruction. But the Filtration Company, believing the intent of the contract to be that it assume the railroad's obligation, so far as it related to the construction of the tunnel, found the railroad's obligation, with respect to the relocation of sewers and watermains, defined by Section 9 of the Act of February 12, 1901 (*supra*), and thereby limited to the making of such relocations *"within the limits of its (the railroad's) right of way."* The Filtration Company contends that it discharged the obligation for the railroad, in full, by paying the District for relocations made within the right of way. Also that it (Filtration Company) never undertook to do or pay for work which the railroad was not required to do. It was claimed by the District, in the Court below, that the Filtration Company had been paid by the railroad for the work which the District did outside the limits of the right of way. There

was not a particle of evidence to sustain that argument, and nothing of the kind will be found in this record. The truth is that the District's allegation was nothing but a deduction from its erroneous contention that the contract between the railroad and the Filtration Company obligated the latter to perform the work outside the right of way as well as within it. As we have seen the contract did not in terms impose any such obligation upon the Filtration Company. Even the obligation to pay for work done within the right of way, rests on implication, which arises only when the contract is construed in the light of section 9 of the act of February 12, 1901.

In argument below, counsel for the District contended that because of the disparity between the estimates furnished by the District and the amounts of the deposits required by the District on the one hand and the actual expenditure for work done within the right of way, on the other, the engineer of the Filtration Company must have known that the District expected to charge for work done outside the right of way, as well as within it. The defendant attempted to lay the ground for that argument in the cross-examination of the company's engineer, Mr. Williams, who testified as follows: (p. 30),

> "We knew that the estimated amount (sewer) was excessive for that which was solely within the right of way, but we considered that we were protected by the law. I did not know the cost of taking out 64 feet of sewer (length within the right of way) and putting it back. I had no estimate on it. I consider $7,693 for taking out 64 feet of sewer an excessive amount. I did not know that it could be done within $1,600. I made no estimate at all. I know that the total estimtae submitted (by the District) was largely in excess of the cost of work required within the right of way."

Also: (pp. 30-31),

"It (the District's estimate) was largely in excess, 50 per cent or more, but I only looked at it in a general way. I did not know it was 80 per cent more, and did not figure out the actual or approximate cost. When we asked the District to do the work, we knew we should have to make this deposit, both as to the watermains and the sewer, covering work within the right of way. I was there daily. The sewer work was begun in January, 1904, and the watermain work about the same time. The sewer and watermain work at New Jersey Avenue and D Street was completed late in March or very early in April. The second water pipe work on which the $600 deposit was made was completed, I think, in May. My answer with regard to the sewer deposit and first water-main deposit would be the same with reference to the second water-main deposit with the addition that the work on the first two had been completed, before we deposited the last $600. Before putting up the $600, we made no demand on the District for the money which we claimed had been expended outside the right of way. We made no demand on the District until May 11th. The work had then been completed. Before putting up the money, I think, I had been referred to the act of 1901."

In connection with this defense the District referred, also, to testimony given by Mr. Parmelee, who in 1903, was the consulting engineer of the Filtration Company. Mr. Parmelee testified (pp. 32-33):

"During the years 1903 to 1906, I was consulting engineer for the New York Continental Jewell Filtration Company, taking a general advisory part in the work of the reconstruction by the Filtration Company of tunnels for the Philadelphia, Baltimore & Washington Railroad Company. I conducted the early ne-

gotiations of the Filtration Company with the railroad and with the municipal authorities in this city. I think I have seen the letter directed to the Filtration Company by Commissioner Biddle (pp. 15-16). Before this letter was written I think I had an interview with Colonel Biddle concerning the relocation of watermains and sewers, about the middle of July, 1903. I do not recall the conversation clearly. We talked over what was necessary to be done in connection with the tunnel, also the disposal of the dirt. To the best of my recollection, I left Colonel Biddle, or Colonel Biddle called in the gentleman in charge of the sewer work and we went around to his office. I do not recall his name. We looked over the plans of the existing sewers, and I think that some sketches were made of a possible inverted siphon under the tunnel, and some discussion was had of the possibility of doing that. I do not recall making any formal plan or having one made. I think those sketches were submitted to the Commissioners. I do not recall submitting any formal plan. I had but one interview that I recall in this matter, and recall no mention of the extent of the work that the Filtration Company was obligated to do or pay for in the matter of relocating sewers and watermains. I am under the impression that some one else was present in Colonel Biddle's office at the time of the interview to which I refer. I had no other interview with any District official about these locations so far as I recall."

The District contends that it was incumbent upon Mr. Parmelee, when asking the District to perform work on the relocations of sewers and watermains, for the company to specify that he meant only the part of the work to be done within the right of way, being that which Congress imposed upon the railroad, and not the part of it to be done outside the right of way, which Congress had imposed upon the district. As opposed to that contention,

plaintiff argued that in the absence of any express statement with reference to the matter, the only reasonable inference that could be drawn from the conversation described by Mr. Parmelee was that the work under discussion was that required of the railroad and which the Filtration Company was about to undertake for the railroad, and that would have been unreasonable to suppose that he was offering to pay the District for doing what the District was already obligated to do. On the contrary, if Colonel Biddle had wished the Filtration Company to volunteer to relieve the District of the obligation imposed upon it, he should, in fairness, have communicated that very extraordinary wish to the Filtration Company in unmistakable terms.

The fact that the company knew that the District was doing work upon the sewer and watermains outside the right of way and did not protest against it, and did not call upon the District for a statement of the cost of the work to be charged against the deposits, until after the work had been completed, is not significant. Section 9 of the act of 1901, required the District to perform the work outside the right of way, whether the company asked that that work be done or not. Until the work was completed its cost could not be ascertained, and prior to its completion it would have been futile for the company to ask for a statement of its cost. The amount of the "unexpended balance" of the deposits could not be ascertained until the work covered by them had been completed. According to the arrangement between the company and the District the balances were not returnable to the company until after the completion of the work.

It was argued on behalf of the District that the Filtration Company had misled the District by making the second deposit on account of changes in watermains, without disputing the District's authority to use the money formerly

deposited for work done outside the right of way. That argument falls to pieces in the light of the facts. The company did not know and had no means of knowing that the District would attempt to charge for work that it was doing outside the right of way. The Commissioners decided to make the second change in watermains about January 18, 1904 (p. 22). Work on the relocation of the sewer and on the relocations of the water mains, for which arrangement had been made in July, 1903, was still in progress and uncompleted when the second change in watermains was decided upon. The company made the deposit on account of the second change of watermains on April 22, 1904 (p. 22). As a matter of fact, the earlier items of work had then been completed, but the company had received no notice of their completion from the District. Each deposit slip contained this condition with respect to the adjustment of the account and return to the company of the unexpended balance:

> *"You will be notified when the work is completed and any unexpended balance of your deposit will be returned to you."*

The District never notified the company that any of the work had been completed, but on May 11, 1904, knowing that all of the work had been completed, the company asked the Commissioners for a statement of the account and the return of the balances (p. 23), to which request the Commissioners did not respond until after the company had repeated it on June 1, 1904 (p. 24). Even then the Commisioners, instead of complying with the company's request, merely furnished vouchers giving the sum which the district was attempting to deduct from each deposit, and the amount of the balance which it offered to return

to the company. It was not until July 12, 1904 (p. 27) and after it had made a third demand for a statement of the account (p. 25), that the District sent the company a statement which disclosed the fact that the deductions, which the District was attempting to make, included the cost of work done outside the right of way.

Another point made by the defense was that each deposit slip sent to the company bore, at its top, the legend: "Whole cost." It did not say "whole cost" of anything in particular. The Filtration Company expected to be charged with the whole cost of work *within* the right of way. The record contains no explanation of the legend, but it is this: For years the District has made it a practice to require deposits, covering the whole or one-half of the estimated cost of work, to be done by the District in laying sidewalks. Where an abutting owner requests that a certain section of sidewalk be laid at once, he is charged with the entire cost of the work and required to deposit the full amount of it with the District before the work is commenced. He is furnished with a deposit slip like those sent to the Filtration Company, bearing this legend: "Whole cost" (Form 131—1 M—11-6-09). Where an abutting owner asks that sidewalk be laid, but is willing to await the convenience of the District in laying it, he is required to pay one-half of the cost and to deposit with the District one-half of the estimated cost. The deposit slips furnished him bear the legend "Half cost" (Form 125—1 M—11-1-10). There seems to be no express authority for this practice.

In deciding the cause the Court of Appeals held: *1.* The relation existing between the District and the railroad company, and hence the relation between the District and the Filtration Company was not, strictly, a contractual one (p. 54). *2.* The extent of the work undertaken by the

railroad company, and hence the extent of the work upon the tunnel which the Filtration Company agreed to perform for the railroad was determined by the permit which the Commissioners issued to the Railroad company on September 10, 1903 (pp. 54-55). *3*. The contract entered into by the railroad company and the Filtration Company on December 10, 1903, was admissible as tending to show what was the subject matter of the arrangement made between the Filtration Company and the District, with regard to the relocation of the sewer and water-mains, in July of 1903. *4*. The transactions drawn in question are to be construed in the light of the act of 1903, and not in the light of Section 9 of the act of 1901. *5*. By the act of 1903 the railroad company was required to build the tunnels and to perform or pay the cost of all work incident to their construction, including the relocation of sewers and water-mains, both within and without the right of way, and the Filtration Company having undertaken to build the tunnel is chargeable for the work done by the District upon the sewer and watermains outside the right of way as well as within it. *6*. "In any view of the case, plaintiff was not entitled to recover, hence no error was committed in instructing a verdict for defendant."

This, I submit, was erroneous, for these reasons:

Specifications of Error.

I. The said court erred in failing and refusing to hold that the agreements and transactions of the plaintiff and defendant, drawn in question, were entered into in furtherance of the act of Congress relating to the relocation of the tracks and appurtenances of the Philadelphia, Baltimore & Washington Railroad Company, entitled "*An act to provide for eliminating grade crossings on the line of the*

Baltimore & Potomac Railroad Company, in the city of Washington, District of Columbia, and requiring said company to depress and elevate its tracks and to enable it to relocate parts of its railroad therein, and for other purposes," approved February 12, 1901, and act, entitled "*An act to provide for a union railroad station in the District of Columbia and for other purposes,*" approved February 28, 1903. In case of ambiguity with respect to the work contemplated by the parties and which formed the subject matter of the said agreements and transactions, resort may be had to the said acts of Congress to ascertain the extent of the said work.

II. The said court erred in holding that the transactions of the parties with respect to the relocations and changes of the sewer and watermains incident to the construction of the tunnel, required by the act of Congress entitled "*An act to provide for a union railroad station in the District of Columbia and for other purposes,*" approved February 28, 1903, were in no way governed or affected by the act of Congress entitled "*An act to provide for eliminating grade crossings on the line of the Baltimore & Potomac Railroad Company, in the city of Washington, District of Columbia, and requiring said company to depress and elevate its tracks, and to enable it to relocate parts of its railroad therein, and for other purposes,*" approved February 12, 1901.

III. The said court erred in holding that the transactions of the plaintiff and defendant, drawn in question, were or could have been, modified or affected by the permit issued by the defendant to the Philadelphia, Baltimore & Washington Railroad Company on September 10, 1903, or the contract entered into between the plaintiff and the said railroad company on December 10, 1903.

IV. The said court erred in holding that the permit is-

sued by the District of Columbia to the Philadelphia, Baltimore & Washington Railroad Company on September 10, 1903, and the contract entered into by the plaintiff and the said railroad company on December 10, 1903, were admissible as evidence tending to show the subject matter of the agreements and the transactions of the plaintiff and the defendant, drawn in question in this cause.

V. The said court erred in failing and refusing to hold that the District of Columbia was authorized to expend from, or charge against, the moneys deposited with it by the plaintiff, the cost of work done upon relocations and changes of sewers and watermains within the right of way of the Philadelphia, Baltimore & Washington Railroad Company, and no more, and that the plaintiff was entitled to recover from the defendant herein the balance of its said deposits which remained after the deduction of the cost of said work done within the railroad company's right of way.

VI. The said court erred in holding that the trial court committed no error in instructing the jury to return a verdict for the plaintiff for the sum of $1,089.79, with interest, which said sum represented the balance of the moneys deposited by the plaintiff with the defendant, remaining after the defendant had expended and deducted from the said deposits the cost of relocations and changes of the sewer and watermains, made both within the right of way of the Philadelphia, Baltimore & Washington Railroad Company and outside the limits theroef.

ARGUMENT.

The case, turning as it does upon a question of law, the arguments upon which the plaintiff relies and those upon which the defendant relied in the courts below and will,

doubtless, rely upon here, have been presented quite fully in the foregoing statement. It is desired, however, to discuss briefly the rulings of the Court of Appeals which are assigned as error, and to bring to the court's attention authorities which are believed to control the decision of the question presented, but which the Court of Appeals declined to apply and follow.

I.

The transactions between the Filtration Company and the District with respect to the removal and relocation of the sewer and watermains, resulted in a contract. In the absence of any expression by the parties defining the extent of the work which formed the subject matter of their contract, its extent must be ascertained by reference to the statutes by which the work was required and in furtherance of which the contract was made. (*Assignments of Error I, II, V and VI.*)

The Court of Apepals said of the relation which existed between the District and the railroad company (pp. 54-55):

> "That relation was not strictly a contractual one. The railroad company had imposed upon it the duty of making a vast improvement of a public nature, in return for which it was to be paid a large sum of money and extended certain privileges and franchises. The duty of the officers of the District was to see that the work was accomplished as required by law in a manner best suited to subserve the public welfare."

With these premises, the court proceeded to hold that the obligations of the railroad company and of the Filtration Company were to be ascertained from the permit, issued to the railroad company by the Commissioners, and that the permit was to be construed in the light of the act

of 1903 alone, the act of 1901 being inapplicable. That would seem to be in conflict with the interpretation and effect given the acts of 1903 and 1901 by this court, and by the Court of Appeals as well, in the case of *Millard v. Roberts* (202 U. S. 429). There, Mr. Justice McKenna delivering the opinion of this court, said:

> "This is a bill in equity to enjoin Ellis H. Roberts, as Treasurer of the United States, from paying to any person any moneys of the District of Columbia, under certain acts of Congress (31 Stat. L. 767, 774, Act of 1901; 32 Stat. L., 909, Act of 1903)."

After showing that the statutes were not repugnant to the Constitution and were valid, the opinion continued:

> "The titles of the acts are the best brief summary of their purposes, and those purposes are obviously of public benefit. We do not think that it is necessary to enter into a discussion of the cases which establish this. The scheme of improvement provided by the acts required a removal of the railroads from their situations, large expenditures of money by the companies, and the surrender of substantial rights. These rights are recognized, and their surrender expressed to be part of the consideration of the sums of money paid to the companies. *Indeed, there is an element of contract, not only in the changes made, but in the manner and upon the scale which they are required to be made.* As remarked by Mr. Justice Morris, speaking for the court of appeals:
>
> "'*The case is practically that of a contract between the United States and the District of Columbia on the one side and the railroad companies on the other,* whereby the railroad companies agree to surrender certain rights, rights of property as well as other rights, and to construct a work of great magnitude; greater, perhaps, than their own needs require, but

> which Congress deems to be demanded for the best interest of the national capital and by the public at large; and for this surrender of right and this work of magnitude commensurate with the public demand, Congress agrees to pay a certain sum, partly out of the funds of the District of Columbia. *It is a simple case of bargain and sale, like any other purchase.*' (25 App. D. C., 221.)"

The obligation devolving upon the railroad, whether the relation existing between it and the District of Columbia was of a contractural nature or not, was to perform the work required of it by the acts of Congress (*supra*) and no more. The office of the permit was to prescribe the manner in which the work should be done, not what the work should consist of. The acts of Congress required the railroad company to relocate its line, constructing for that purpose, a viaduct, the tunnels in question, and tracks leading from the northern portal of the tunnels, to the proposed union station, and to perform certain other work incident to the use of this line, but none of which was to be done within the District and outside the right of way allotted to the railroad company or lands which the railroad might acquire for terminal purposes. In the case of street crossings, to be provided by subways running under or viaducts extending over its tracks, the railroad was only required to defray one-half of the cost of work done *within its right of way,* the remaining half of this cost being imposed upon the District and the United States, jointly (Act 1903, sec. 10). But there was nothing in either act which required the railroad company to relocate or pay for the relocation of the city's sewers and watermains and other public utilities of that nature, which would have to be relocated or changed on account of the construction of the tunnel, except Section 9 of the act of 1901 (*supra*). The policy

of Congress, evident throughout these acts, was to impose upon the railroad the cost of the work of relocating its line within its right of way, and to impose upon the District, the work of relocating and restoring public utilities outside the railroad's right of way, which it might be found necessary to relocate on account of the relocation of the railroad's line. Consistent with this policy Section 9 of the act of 1901 imposed upon the railroad the work of relocating sewers, watermains and the like structures as far as that work might be found necessary or desirable, within its right of way, and imposed upon the District all work of that nature which might have to be done outside the right of way. No other provision of the statute required the railroad to perform or pay for any part of such work, whether within the right of way or without it. Some such division of the work and its cost was essential. It would have been as unjust and unreasonable for Congress to impose upon the railroad the cost of reconstructing the permanent sewers and watermains of the city which crossed its right of way, to any extent that the Commissioners might think desirable, as it would have been to require the District to remove its sewers and watermains from the railroad's property or to pay for relocations made with the boundaries of the railroad's property. Congress did neither of these things and, being empowered to distribute the work and apportion its cost as it deemed best, did so, in the manner above described. I submit that the court below erred in holding that Section 9 of the act of 1901 did not apply to the construction of the tunnel and that all of the work involved in this case was required of the railroad (p. 55). Where is that requirement? If it had not been the intent of Congress to extend, to work upon the terminal improvement as described in the act of 1903, such general provisions, governing the performance of the

work and the division of its cost as that contained in Section 9 of the act of 1901, why did Congress enact Section 8 of the act of 1903? This reads:

> "Except as modified by this act, all *provisions* of said act relating to the *Baltimore & Potomac Railroad Company, approved February twelfth, nineteen hundred and one*, and all rights, powers and processes thereby conferred on said last-named company or upon the Southern Railway Company, *shall remain and continue in full force and with the like effect as if herein re-enacted at length.*"

If the Commissioners had wished to make an arrangement for the division of work or the division of cost, different from that prescribed by Section 9 of the act of 1901, and more favorable to the District in a pecuniary way, and it had been competent for the Commissioners to do so, it would have been an easy matter for them to say so at the outset of their negotiations with the Filtration Company. It was inequitable and unjust to keep silent on the subject as the District did and then after the company had deposited its money and the work had been completed and the company had twice demanded a statement of the District's expenditures with the return of the unexpended balances, to say that the District proposed to charge for more work than the law had imposed on the railroad and more than the plaintiff ever undertook to perform. In the absence of anything to the contrary expressed in the agreement between the Filtration Company and the District, under which work was done, and in the absence of anything anywhere in the record to prove that the parties had in contemplation something different from the division of work and cost prescribed by Section 9 of the act of 1901, the bargain in question must be interpreted in accord-

ance with that section and the Filtration Company held liable for the part of the work alone which Congress had imposed upon the railroad company and which the Filtration Company was undertaking to do for the railroad.

Mr. Justice Swayne, delivering the opinion of this court in *Walker v. Whitehead* (16 Wall., 314), said:

> "The laws which exist at the time and place of the making of a contract and where it is to be performed, enter into and form a part of it. This embraces alike those which affect its validity, construction, discharge, and enforcement."

A similar statement of the law is found in the case of *United States v. Murphy* (82 Fed. R., 897), where Bradford, J., said (p. 898):

> *"But the terms of the contract, as here referred to, are not, in a legal sense, necessarily confined to the expressed words clothed in their common law meaning. To ascertain the terms of the contract, any statute existing when the undertaking was entered into and applicable to its scope and operation must be considered in connection with the language employed in the contract. For, as was said by the court in McCracken v. Hayward,* 2 How., 608-14, *'no agreement or contract can create more binding obligations than those fastened by the law, which the law creates and attaches to contracts.' Such obligations have precisely the same legal effect as if expressed in the contract. They form a portion of its terms."*

II.

> *"The permit granted to the railroad company and the contract between the Filtration Company and the railroad company did not impose upon the railroad or the Filtration Company an obligation to perform or*

pay for the work in question or any work upon the permanent sewers or watermains of Washington outside the railroad's right of way. Had either or both of these instruments attempted to impose such an obligation, it could not have modified the bargain between the Filtration Company and the District with regard to the performance of that work, nor can resort be had to either instrument upon the theory that it might tend to 'throw light upon the transactions of the parties and show what was the subject matter of their bargain' (Assignments of Error III and IV)."

As to the permit little need be said in addition to statements already made. The three paragraphs quoted by the Court of Appeals (pp. 52-53) do not, nor does any portion of the permit pretend to define the extent of the obligation of the railroad with respect to performing or paying for work upon the reconstruction of sewers and watermains in permanent form. One requirement quoted reads:

> "All construction material and public property of whatever nature *taken out of the street* and not previously paid for by the railroad company shall be disposed of as the Engineer Commissioner of the District of Columbia shall direct and any such material or property destroyed or unaccounted for must be paid for or replaced by the Philadelphia, Baltimore & Washington Railroad Company * * *."

That has no bearing upon the present case for the sections of the sewer and of the watermains, which were removed, were not "taken out of the street," nor is it claimed that the material of which they were composed was "destroyed or unaccounted for." Another requirement of the permit quoted by the Court of Appeals, reads:

> "And no sewer, watermain or lighting or lighting fixtures or appurtenances *to the premises of any abutting property* shall be disturbed or destroyed until provision has been made by said railroad company for continuing the service, *it being the intention hereby that no property shall be deprived of any such privilege now enjoyed.*"

That does not bear upon the facts under consideration. It is not claimed and could not properly be claimed in this case that by reason of the relocations made by the District any property was deprived of sewer or water privileges. As stated above, this clause must have been included in the permit, to satisfy the requirement of Section 7 of the act of 1901 (proviso), which relates to work of a temporary character and calls for the maintenance of the sanitary systems of the parts of the city to be traversed by the new line of railroad throughout the period of construction. The remaining requirement of the permit, which was quoted by the Court of Appeals relates to the inspection by the District of work done by or on behalf of the railroad. That does not require the railroad to do any particular work, or to pay for anything except possibly the cost of inspection.

As to the contract between the Filtration Company and the railroad company; plaintiff does not deny that it might, by such a contract, have agreed to do work for the railroad, which the railroad was not obligated to do, even work which the statute required the District to do. If the company had so agreed, *and it did not*, the District could not claim, in this action, that it was thereby relieved of a duty imposed upon it by law, and the District could not charge the Filtration Company for work which the law imposed upon the government.

Mechem on Agency, Sec. 759: "The liability of third persons to an agent upon a contract made with him *is to be ascertained by that contract alone* and cannot be enlarged by reference to any agreement between the agent and the principal by which *their* mutual rights are to be determined."

Story, Eq. Jur., Sec. 993: "If two persons, for a valuable consideration as between themselves, covenant to do something for the benefit of a third person, who is a stranger to the consideration, the latter cannot enforce the covenant."

It is useless, however, to discuss this moot question for the contract did not call upon the Filtration Company to make or pay for the removal or reconstruction of sewers or watermains or public works of that nature, except within the right of way. On the contrary, the contract did provide *"that the contractor (Filtration Company) shall not be responsible for any consequential damage or liability due to the construction of the tunnels* (p. 41). Paragraph III of the contract which is quoted by the Court of Appeals (p. 53), related to the provision by the Filtration Company of falsework for the maintenance of streets, sewers, watermains, and other public and quasi-public works "which it (Filtration Company) may *encounter in doing work upon the tunnels.*" It required also that the Filtration Company "obtain from the proper authorities of the District of Columbia the necessary permits to make any changes, which may be necessary in said streets * * * sewers, tracks, and conduits." It does not appear from the record that the District furnished any falsework for the maintenance of the sewers or watermains, "encountered in doing the work upon the tunnels" unless it were in connection with work done *within the right of way* for which the Filtration Company has paid and was al-

ways willing to pay. Nor does it appear that the Filtration Company failed to obtain from the District any permit needed for the work in question. It made a bargain by which the District, itself, agreed to perform the work. If the company had failed in this particular it would have been for the railroad to complain, not the District. Clearly the paragraph did not obligate the Filtration Company to do any and all work that the Commissioners might call for, whether imposed upon the railroad or not, or that the Filtration Company should submit to charges, made by the District for work which the law imposed upon the District and the United States.

I submit that the judgment of the Court of Appeals should be reversed.

JAMES H. HAYDEN,
Of Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 145.

THE NEW YORK CONTINENTAL JEWEL FILTRATION COMPANY, PLAINTIFF IN ERROR,

vs.

DISTRICT OF COLUMBIA.

BRIEF FOR DEFENDANT IN ERROR.

Statutes.

The act of Congress approved February 12, 1901 (31 Stats., 767), required the Baltimore and Potomac Railroad Company to relocate parts of its railroad within the city of Washington, in the District of Columbia, and to eliminate certain grade crossings,

> "it being the purpose of this act that the said railroad shall be located under Sixth street southeast, Fifth street southeast, Fourth street southeast, Third street southeast, and Second street southeast, in a tunnel as aforesaid; that New Jersey avenue shall be carried over said railroad on an iron or steel bridge; and that said railroad shall be carried over South

> Capitol street, Delaware avenue, First street southwest, Second street southwest, Third street southwest, Four-and-a-half street southwest, Sixth street southwest, Seventh street southwest, Maryland avenue, and B street southwest, and that Ninth street southwest, Tenth street southwest, Eleventh street southwest, and Twelfth street southwest shall be carried over said railroad on iron or steel bridges. The railroad shall also be carried over Water street southwest."

Section 2, among other things, required the abandonment of certain tracks.

Section 3 allowed the railroad company the right to occupy and use a certain portion of the Mall

> "to erect and maintain thereon a station building and appurtenances, train sheds, and tracks and sidings in connection therewith,"

and directed the construction of a

> "public passageway for vehicular and pedestrian traffic"

in a certain manner.

Sections 4 and 5 provided for temporary tracks and directed the removal of the Fish Commission Building.

Section 6 required the railroad company to

> "support the sides of all embankments and excavations made in the streets wherein the same are located with suitable retaining walls of stone * * * carried to a height of four feet above the revised grades of said streets."

Section 7 required the railroad company to vacate certain streets, and provided for the change of grade of streets affected by the act, and section 8 gave the railroad company certain rights in Garfield park.

> "SEC. 9. That the entire cost and expenses of the revision, changes, relocations, and improvements of and in said railroad, as authorized and required by

the preceding sections of this act, and of all structures connected therewith or incidental thereto, shall be borne, paid, and defrayed in manner following, to wit: The said Baltimore and Potomac Railroad Company shall bear, pay, and defray all cost and expense of the relocations, elevation, and depression of its tracks within the limits of its right of way as are authorized and required by this act, including the construction of so much of the bridges conveying streets over its tracks, right of way, and other property as shall be within the limits thereof, and the reconstruction within such limits of the streets which shall be carried beneath the same, the cost and expense of removing its tracks from Sixth street north of Virginia avenue, and from K street and Canal street, and the restoration of such parts of said streets for the uses of the public, and the cost and expense of constructing and maintaining the arch or arches for passageways underneath its said tracks located on the Mall, as well as the original cost of paving the roadways and sidewalks to be located within the said passageways. All other costs, expenses, and damages resulting from, incidental to, or connected with the revisions, changes, and improvements in alignment and grades of said railroad, or the relocations thereof by this act required and authorized, and from changes in the grades of the streets or the railroad, and the lawful operation of the said railroad upon the location and structures contemplated and required by this act, and whether to property owners affected thereby or otherwise, as well as the cost and expense of all street approaches to said company's tracks and right of way, whether overhead by means of bridges or under grade, shall be borne, paid, and defrayed in manner following, to wit: Fifty per centum thereof by the United States and the remaining fifty per centum thereof by the District of Columbia, which last-mentioned fifty per centum shall be levied and assessed upon the taxable property and privileges in said District other than the property of the United States and of the District of Columbia.

"All work within the limits of the said railroad company's right of way, including the bridges within

said limits, shall be done by said railroad company to the satisfaction and approval of the Commissioners of the District of Columbia, who are authorized to exercise such supervision over the same as may be necessary to secure the proper construction and maintenance of the said work. And all work which is without the limits of the right of way of said railroad company shall be done by the District of Columbia."

Section 10 authorized condemnation proceedings by the railroad company.

Sections 11 and 12 authorized the rebuilding of Long bridge.

Section 13 required the approval by the Commissioners of the District of Columbia of plans for the whole work, and for the payment of District inspection by the railroad company.

Section 14 related to taxation, and section 15 gave the right of succession to the Philadelphia, Wilmington and Baltimore Railroad Company.

By the act of February 28, 1903 (32 Stats., 909), an entirely new plan was provided. It changed generally the location of the tracks, and particularly at the place where the work was done which is involved in this suit. It recognized both the Philadelphia, Baltimore and Washington Railroad Company and the Baltimore and Potomac Railroad Company, mentioned in the previous act, as well as the terminal company provided for in section 10 of the previous act. Joint construction was authorized. The new station, viaduct, yards and switches, and Baltimore and Ohio freight station were also authorized.

Section 5 directed that certain streets be vacated and the formation of the Massachusetts Avenue plaza, the latter part of the section requiring the District of Columbia to pay for damages to adjacent property owners resulting from "changes in the grades of streets or alleys."

Section 6 related to taxation, and section 7 required the work to be done under plans to be approved by the Commissioners of the District of Columbia, and in certain instances by the Secretary of War and Superintendent of the Library of Congress.

Section 8 limited the time within which the work should be completed and relieved the railroad company of

> "all duties and obligations respecting relocation of its present passenger tracks and terminal, and location, construction, and operation of new passenger station and new terminal tracks, as prescribed in the act, * * * approved February twelfth, nineteen hundred and one."
>
> "And in consideration thereof, and of the relinquishment and surrender by said Philadelphia, Baltimore and Washington Railroad Company of its right to occupy and use the portion of the Mall, and to maintain thereon a new passenger station and terminals, granted to the Baltimore and Potomac Railroad Company by the act aforesaid in consideration of and as a contribution toward the large expenditures to be made by said company in the relocation and improvement of its line of railroad and elimination of grade crossings resulting therefrom, as required by said act, the sum of one million five hundred thousand dollars shall be paid to said Philadelphia, Baltimore and Washington Railroad Company, its successors and assigns, out of any moneys in the Treasury of the United States not otherwise appropriated."

This section then provides that

> "except as modified by this act, all provisions of said act relating to the Baltimore and Potomac Railroad Company, approved February twelfth, nineteen hundred and one, and all rights, powers, remedies, and processes thereby conferred on said last-named company, or upon Southern Railway Company, shall remain and continue in full force, and with like effect as if herein reënacted at length."

The remainder of the act is perhaps immaterial except possibly the latter part of section 10, which provides that

> "the cost and expense of opening said streets or highways within the limits of such railroad company's right of way, including the cost of constructing the portion of any viaduct bridge, within said limits, shall be borne and paid half by such railroad company, its successors and assigns, and half by the District of Columbia and the United States, but after construction the cost of maintenance shall be wholly borne and paid as in the case of other public highways in the District of Columbia."

The work done by defendant for plaintiff was upon construction neither contemplated nor authorized by the act of 1901. It was embraced in the new location directed by the act of 1903 (Rec., 13, last paragraph), and had nothing to do with "streets or highways" or "any viaduct bridge."

ARGUMENT.

1. The Statutes of February 12, 1901 (31 Stat., 797) and February 28, 1903 (32 Stat., 909) do not control the case.

2. Both by the pleadings and evidence, the case made is one of simple contract composed of an offer or request by the plaintiff to the defendant, which the defendant accepted and performed:

> *a.* The defendant having performed the work at the plaintiff's request, and not being prohibited by law from doing the work at the cost of the plaintiff, the plaintiff is estopped to claim that it should only pay for that part of the work which was physically within the railroad right of way.
>
> *b.* The contract and the estoppel are established by the evidence:

1. The understanding of the parties that the defendant was to do the whole work at the cost of the plaintiff.

2. Knowledge of the plaintiff that the estimated cost was far in excess of the cost of doing the work within the railroad right of way.

3. The plan submitted by the plaintiff showed that the work for which estimates were asked was within and without the railroad right of way.

4. The parties knew before the deposits were made that the work the defendant was asked to do necessitated construction outside the railroad right of way. The estimates also and receipts for deposits so show.

5. The acquiescence of the plaintiff in making an additional deposit for the water main on C street after the other changes had been made, and plaintiff's failure to make any contention until after the whole work had been completed that it was only liable for the cost of the work done within the railroad right of way are pertinent if not controlling.

3. The permit issued by the defendant to the railroad company and the contract between the railroad company and the plaintiff were properly admitted in evidence as a part of the transaction; but, whether admissible or not, they do not change the result.

a. The plaintiff could not have done its work for the railroad without the permit and the contract. These instruments show that the plaintiff was obliged

to do the work it asked the defendant to do for it, and to do that work under the terms of the permit and the contract.

4. If the acts of February 12, 1901, and February 28, 1903, are pertinent, then the construction of the parties (the railroad, the plaintiff, and the defendant) respecting the application of these acts to changes of water mains and sewers necessitated by this tunnel, and the construction of the obligations to arise by virtue of the deposits made with the defendant by the plaintiff fix liability as found on the plaintiff.

5. The act of February 12, 1901, contained no reference to the tunnel or water mains or sewers, while the latter act imposed upon the railroad the obligation to do the entire work, thus modifying the former act, and in return provided for the payment of a large sum of money to the railroad.

Assignments of Error 4 and 5.

It is deemed important at the outset to notice the character in which the plaintiff sues. The declaration discloses that the plaintiff "on July 20, 1908, acting in that behalf *as the agent* of the Philadelphia, Baltimore and Washington Railroad Company, was engaged *in constructing for the said railroad,* certain tunnels at and about the intersection of New Jersey Avenue and D Street, Southeast, in the City of Washington and District of Columbia" (Record, bottom page 1 and top of page 2; affidavit attached to declaration, middle of page 4).

Necessary elements of offer and acceptance constituting a contract between the plaintiff and defendant, independent of statute, are stated in the declaration. The offer is stated as coming from the municipality coupled with a proviso that the plaintiff would deposit with the defendant a sum of money equal to the estimated cost thereof.

It is incorrectly averred in the declaration that at the times the deposits were made it was agreed that the defendant "would expend from said deposits, so much money as might be necessary to defray the cost of such part or parts of the work done in and about the making of the said changes *as the plaintiff or the said railroad was required by law* to perform or pay for," and, as it is claimed that under Section 9 of the Act of February 12, 1901, the railroad was only to bear, pay and defray cost and expenses of relocations within the limits of the right of way, the excess of cost of sewer and watermain changes beyond the limits of the right of way is sought to be recovered back from the District. On this claim of express contract issue was joined.

There was no evidence tending to establish the contract as set up in the declaration, but, on the contrary, it was established, by the evidence that the District did the work at the request of the plaintiff and charged the plaintiff as agreed, the cost of doing it.

The surrounding circumstances indicate such request and agreement.

The estimates of cost preceding the making of the deposits show that the work to be done by the District embraced changes within and beyond the railroad right of way.

This was the understanding of the plaintiff as shown by the affidavit of its resident engineer attached to the declaration.

This affidavit says:

> "That from time to time before the making of such changes the Engineer Commissioner of the District of Columbia, acting in that behalf as the agent of the District, directed notices to the plaintiff, which stated that he had procured estimates of the cost of making *changes* in the location of the said sewers and water mains, *rendered necessary by the construction of the said tunnels*, and that *the* said *District would perform the work required to make the said changes* if the said Filtration Company would deposit with the Col-

Jersey avenue and 2d street, made April 21, 1904, was $600 (Record, bottom page 22).

These statements are verified by a letter of the resident engineer of the plaintiff, dated May 11, 1904 (Record, bottom page 23).

The sewer and water main work was begun in January, 1904, and this work at New Jersey avenue and D street was completed late in March or very early in April, 1904 (Record, top of page 31). The deposit of $600 was made April 22, 1904 (Record, page 5).

The work of changing the water mains on C street was begun after the other work had been finished, and was completed in May, 1904 (Record, top of page 31). Before putting up the $600 no demand was made on the District for the return of money representing expenses beyond the right of way for sewer and water main work which had been completed on New Jersey avenue and D street (Record, page 31).

On May 6, 1904, a letter from Captain Harding showed that all the work of changing the water mains had been completed at a cost to the plaintiff of $1010.89 (Record, bottom page 24).

On June 20, 1904, a letter from Captain Harding showed that the changes in the sewers had been completed at a cost to the plaintiffs of $6,970.13 (Record, page 26).

On May 11, 1904, plaintiff requested a statement of account (Record, page 23). June 1, 1904, the claim was first made by plaintiff for a statement of the cost

> "within the right of way" (Record, top of page 24).

On June 23, 1904, plaintiff requested a more detailed statement of the cost and changes in water mains (Record, page 25).

> "On November 2, 1904, plaintiff's attorney directed a letter to the Commissioners of the District of Columbia, protesting against the account which they

had submitted to the plaintiff and a part of the charges that they proposed to make against the deposit; that is to say, that the defendant was attempting to charge for work which the District of Columbia had done on the relocations outside of the right of way."

Record, bottom page 27.

This letter also stated:

"The work in question was necessitated by the construction of tunnels for the Philadelphia, Baltimore & Washington Railroad, required by the act of Congress approved February 12, 1901, and February 28, 1903."

Record, near top of page 28.

A plan showing that the changes were beyond the limits of the right of way was submitted to the plaintiff and considered by its agent during the negotiations which led up to its application to the District to do the work and its deposit of the estimated whole cost thereof within and beyond the right of way.

"At the beginning of the work, the local negotiations were in charge of Mr. Parmelee for the Filtration Company, as consulting engineer" (Testimony of Williams for plaintiff, Record, middle of page 15; Parmelee, Record, bottom of page 32).

Parmelee called on Colonel Biddle (the Engineer Commissioner) about the middle of July, 1903, "concerning the relocation of water mains and sewers." Witness "left Colonel Biddle, or Colonel Biddle called in the gentleman in charge of the sewer work, and we went around into his office." "We looked over the plans of the existing sewers, and I think that some sketches were made of a possible inverted siphon under the tunnel, and some discussion we had as to the possibility of doing that." * * * "I think those sketches were submitted to the Commissioners." * * * "I had but one interview that I recall on this matter, and recall no

mention of the extent of the work that the Filtration Company was obligated to do or pay for in the matter of relocating sewers and water mains" (Record, page 33).

The interview by Mr. Parmelee, plaintiff's consulting engineer, with Colonel Biddle, is apparently referred to and its date fixed as July 16, 1903, by the letter of Colonel Biddle to the plaintiff dated July 22, 1903 (Record, bottom page 15, top page 16). This letter refers to "the plat which you left with me" * * * and states "The water department made some modification of the plan suggested by you in the drawing which you left, with the object of obtaining better circulation, and the sewer department increases the size and slope of the proposed new portion of the sewer. I return your suggested plan." The plan showed the changes in the water mains and sewer at New Jersey avenue and D street. This work was all outside of the tunnel (Record, bottom page 29). The testimony also shows that there were no water mains in the tunnel and that the old water mains "the abandoned mains lay in the path of the tunnel. We dug them out as we came up to them. The District did the work of making the connections outside the edges of the tunnel. The District did no work connected with the relocation of water mains within the area of the tunnel. There were no water mains in that area" (Testimony of Williams, Record, top of page 22).

The work necessitated construction outside of the railroad right of way. Speaking of the changes Williams testified "that necessitated construction outside the right of way. It was necessary to adopt some such plan" (Record, top page 30). Each estimate preceding each deposit stated that the estimate was "for making necessary changes" (Record, pages 16, 17, 18, 22). The receipts given for the deposit also so state (Record, pages 16, 17, 18, 22).

The provisions of law existing at the time and still existing divide work into whole cost and half cost work, wherein local improvements affecting the streets and highways are to

be made. The whole cost account pertains to deposits made by individuals, firms, companies and corporations, to cover the whole cost of work to be done at their request and expense whenever changes are to be made in public space. This was the situation when the plaintiff requested to be advised what it would cost them to have the whole work done within and without the railroad right of way by the District. The plaintiff made the offer and the District accepted it. After the estimate was made, amounting to a tentative offer on the part of the District to do the work at the request of the plaintiff, the plaintiff accepted and made the deposit. Independently, therefore, of the act of Congress relating to the changes and relocations of grades there was a contract thus made by the District and plaintiff. This work was done at the plaintiff's request and the plaintiff charged the actual cost of it and there seems to be no reason why it should not pay the defendant.

The permit was not only admissible in evidence but it was contemplated by the parties. The municipal authorities had a duty to perform not only in reference to the particular work involved in the present litigation but in reference to all of the work to be done by the plaintiff as the agent of the railroad in constructing the tunnel. The permit starts out (Record, page 34) by grant of permission to the railroad to construct the tunnel. It deals with the transportation of construction materials and with the operation of a temporary railroad over public space.

In aid of the plaintiff's work provision is made for other occupation and use of public space.

It is manifest, that the plaintiff could not have performed its contract with the railroad without this grant and that it necessarily claimed the right to proceed with its contract under the permit.

The permit was therefore a part of the very thing being done. If it is treated as a contract with a right given the railroad then its agent, the plaintiff, acting under it, is bound by it.

In reference to the contract between the plaintiff and the railroad it is to be observed that this is also a part of the same transaction and it amounts to a declaration or admission of the plaintiff against its interest, and is, therefore, evidence. The contract provides expressly that the contractor is to be put to the cost and expense of "removing, changing or altering all water mains, gas pipes, sewers, etc." * * * "and any other lawful obstruction which it may encounter in doing the work upon the tunnels" (Record, page 41). The permit was issued on September 10, 1903; the contract was entered into December 10, 1903, and the first work relating to sewers and water mains was begun in January, 1904 (Record, top of page 31). The permit was also admissible in evidence because it was in the nature of a contract to which the plaintiff, working under it, was a party and also as being in the nature of a municipal ordinance. Judge Dillon says:

> "All persons upon whom ordinances are binding *are bound to take notice of them.*"
>
> 2 Dillon Mun. Corp. (5 ed.), Sec. 629.
> See also McQuillin Mun. Ord., Sec. 22.

In the nature of a contract having been acted on it could not have been revoked except for the provision making it subject to suspension or revocation (Record, page 38).

In Dobbins *vs.* Los Angeles a municipal ordinance was adopted in September fixing the limits within which gas works might be erected. Thereafter a permit was granted for the erection of a plant; in November another ordinance was adopted amending the September ordinance and by which ordinance the territory on which the works were in course of erection and purchased in reliance upon the September ordinance was excluded. There had been no change in the neighborhood or conditions. The court held that the owner of the land having partly erected the works had acquired property rights and was entitled to protection against

unconstitutional encroachments which would have the effect to deprive her of her property without due process of law.

Dobbins *vs.* Los Angeles, 195 U. S., 223.

> "If the proper officer gives a permit for the erection of certain specially described buildings in Washington city, a clear case of danger to the public safety, or of departure from the permit, must be made before the party acting under it can be arrested midway in the construction of them, and required to remove them."
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> Dainese *vs.* Cooke *et al.*, 91 U. S., 580.

Assignments of Error 2 rnd 3.

No further discussion is thought necessary respecting the permit and contract mentioned in assignment of error No. 3.

Assignment of error No. 2 is unimportant, if the court finds that independently of the statutes plaintiff and the defendant had contracted that the work to be done by the District for the plaintiff included work beyond the railroad right of way, as well as work within that right of way. The parties to this contract by their acts did not acquiesce in the interpretation that the act of February 12, 1901, controlled or modified their contract. The tunnel which was the subject of the agreement between the parties was not provided for by the act of February 12, 1901. That tunnel was provided for under the act approved February 28, 1903, and in any construction given by the parties to the statutes their acts show such construction assumed that section 9 of the act approved February 12, 1901, did not apply. The Court of Appeals says (Record, pages 55, 56):

> "We think these transactions are to be construed entirely in the light of the act of Congress of 1903, and not by the act of 1901. Section 9 of the former act, relating to the division of costs, had no reference to the construction of the tunnels. It related to an entirely different plan of improvement. It made no

reference to the replacing of the water mains and sewers. It contemplated a division of expense between the railroad company named therein and the District of Columbia, while the later act imposed upon the Philadelphia, Baltimore and Washington Railroad Company the obligation of doing the entire work without qualification, and on consideration thereof, provided that it should be paid by the United States one million five hundred thousand dollars. The act of 1903 being clear in its provisions as to the obligations imposed upon the railroad company and the corresponding duty imposed upon the District, the provisions of section 9 of the act of 1901 cannot be read into it without doing violence to the express terms and intent of the later act."

Assignment of Error No. 1.

It is difficult to see how the court could have held that because the railroad company might not have been obliged, under the letter of the statute, to pay for work done outside of the right of way, an independent contract by its agent employed to do a portion of the work involved in the general scheme, needed recourse to these statutes to interpret the agreement made between the plaintiff and defendant.

The Court of Appeals in this case deemed it proper to inquire into the nature of the relations existing between the District and the railroad company. The court says:

> "That relation was not strictly a contractual one. The railroad company had imposed upon it the duty of making a vast improvement of a public nature, in return for which it was to be paid a large sum of money and extended certain valuable privileges and franchises. The duty of the officers of the District was to see that the work was accomplished as required by law in a manner best suited to subserve the public welfare."
>
> Record, page 54.

This court, in speaking of the relationship between the District and the railroad company, has said, in Millard *vs.* Roberts:

> "The titles of the acts are the best brief summary of their purposes, and those purposes are obviously of public benefit. We do not think that it is necessary to enter into a discussion of the cases which establish this. The scheme of improvement provided by the acts required a removal of the railroads from their situations, large expenditures of money by the companies, and the surrender of substantial rights. These rights are recognized and their surrender expressed to be part of the consideration of the sums of money paid to the companies. Indeed, there is an element of contract not only in the changes made, but in the manner and upon the scale which they are required to be made. As remarked by Mr. Justice Morris, speaking for the Court of Appeals:
>
> " 'The case is practically that of a contract between the United States and the District of Columbia on the one side and the railroad companies on the other, whereby the railroad companies agree to surrender certain rights, rights of property as well as other rights, and to construct a work of great magnitude, greater perhaps than their own needs require, but which Congress deems to be demanded for the best interest of the national capital and by the public at large; and for this surrender of right and this work of magnitude commensurate with the public demand, Congress agrees to pay a certain sum, partly out of the funds of the United States and partly out of the funds of the District of Columbia. It is a simple case of bargain and sale, like any other purchase."
>
> Millard *vs.* Roberts, 202 U. S., 429, 437.

Whatever effect such remarks may have as between the railroad and the District, they do not control nor affect the contract between the plaintiff and defendant.

There is nothing, however, in either act to prevent the District and the railroad company from agreeing or contracting that the railroad shall be liable for certain parts of the

work within the tunnel right of way, and that the changes incident thereto shall be borne and paid by the railroad company. In fact the plaintiff is not within the terms of either act of Congress. The outside agencies of the railroad must look to their contracts with the railroad in order to govern the acts which they are required to do by virtue of their contracts. There would be nothing unlawful in the District procuring all the work outside of the right of way to be done free of expense to the municipality. The most that could be claimed is that it would be unlawful for the District to become responsible for more than one-half of the work to be done outside of the right of way. Again, it may be doubted whether the mere removal of water mains and sewers within the right of way would be a compliance of the act of February 12, 1901. Section 9 of that act avoids mention of tunnels. It says:

> "The said Baltimore and Potomac Railroad Company shall bear pay and defray all costs and expenses of the relocation, elevation and depression of its tracks within the limits of its right of way as are authorized and required by this act."

The act then defines what this is to include:

> "Including the construction of so much of the bridges conveying streets over its tracks, right of way, and other property as shall be within the limits thereof, and the reconstruction within such limits, of the streets which shall be carried beneath the same, the cost and expense of removing its track from Sixth street north of Virginia avenue, and from K street and Canal street, and the restoration of such parts of said streets for the uses of the public, and the cost and expense of constructing and maintaining the arch or arches for passageways underneath its said tracks located on the Mall, as well as the original cost of paving the roadways and sidewalks to be located within the said passageways."

Nothing is said about tunnels and the scheme of the new Union Station was not then in contemplation.

It is not difficult to understand, therefore, that when it came to the removal of the water mains and sewers within the tunnel the railroad company and the District should have understood that for *all necessary* changes to a sewer and water system and the costs thereof the railroad and its agent would be responsible, and so understanding that the railroad should require the plaintiff as its contractor to do this work at its own cost and expense, and that the plaintiff as such contractor should agree so to do, and should have, prior to making that contract, called on the District to ascertain the whole cost of doing it and have deposited, months before the plaintiff entered into the contract with the railroad company, a sufficient sum of money with the District to cover the cost of doing the work within the right of way and making necessary changes beyond it. Thus we find all the parties whenever contracting on this subject interpreting the acts of Congress as fixing liability upon the railroad and its agent to do the whole of the work. It is a familiar principle that the practical interpretation by the parties is entitled to great if not controlling influence. Finding that the practical interpretation of the acts of Congress is in harmony with the distinct agreement made by the plaintiff with the defendant, it would seem clear that the plaintiff in error has no cause of complaint of the judgment of the courts below.

Chicago *vs.* Sheldon was a case where the validity of an assessment for paving between the tracks of a street railroad and the construction of a city ordinance requiring that

> "the company shall, as respects the *grading, paving, macadamizing, filling,* or *planking of the streets, or parts of the streets.*" * * * keep a certain space "in good condition and repair."

The court held that the company was

> "not to grade, pave, macadamize, fill, or plank even the above width or distance, except so far as such work came within the category of repairs."

The court added:

> "What adds great weight to this view is, it accords with the practical construction given to the contract by both parties. It was entered into, as we have seen, on the 23rd May, 1859. Several of these special assessments were authorized subsequently by the common council and collected, but no attempt was made to assess the railroad property of the company. Nor was any question raised as to its exemption till 1866, and not then by the city, but by some of the proprietors of lots fronting on the streets. In cases where the language used by the parties to the contract is indefinite or ambiguous, and, hence, of doubtful construction, the practical interpretation by the parties themselves is entitled to great, if not controlling influence. The interest of each, generally, leads him to a construction most favorable to himself, and when the difference has become serious, and beyond amicable adjustment, it can be settled only by the arbitrament of the law. But, in an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the court as the true one."
>
> Chicago *vs.* Sheldon, 9 Wall., 50, 54.

Not only did the plaintiff deposit the money required to make all the necessary changes at New Jersey avenue and D street, but when it was found a long time afterwards, that similar changes were required on C street with respect to water mains, it deposited the whole cost of the work without objection. It was silent until all the work had been done and then it made a claim for repayment. Plaintiff had been paid for the work by the railroad company and the defendant had made a full settlement with the railroad company.

After everything had been completed the plaintiff changes its position. If the plaintiff had notified the defendant in the beginning that it would only pay for the work within the right of way the defendant could have refused to do the work and could have held the plaintiff responsible for any negligence or any omission respecting it. Under these circumstances it is respectfully submitted that the plaintiff is estopped now to claim the return of any of the money except the sum for which it obtained judgment.

Respectfully submitted,

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